CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 453

UNITED STATES TRUST COMPANY OF NEW YORK, AS EXECUTOR U/W OF GEORGE H. BUNKER, DECEASED, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 31, 1938.

CERTIORARI GRANTED DECEMBER 5, 1938.

SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 6, 1939.

—9382

[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 87544

UNITED STATES TRUST COMPANY OF NEW YORK, as Executor u/w of George H. Bunker, Deceased, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Petitioner: Wilder Goodwin, Esq.

For Respondent: Eugene G. Smith, Esq.

DOCKET ENTRIES

1936.

Dec. 21. Petition received and filed. Taxpayer notified. (Fee paid.)

Dec. 21. Copy of petition served on General Counsel.

1937.

Jan. 21. Answer filed by General Counsel.

Jan. 27. Copy of answer served on taxpayer.

June 8. Motion for Circuit hearing at New York filed by General Counsel. 6/14/37 granted.

Aug. 5. Stipulation of facts filed.

Aug. 6. Motion to submit case on stipulation of facts and briefs allowed by Rule 35, filed by the parties.

Aug. 9. Order that motion to submit be granted, with leave to the parties to file briefs under Rule 35 if they desire, and proceeding to be assigned to Division 11 upon submission, entered.

[fol. 2] 1937.

Sept. 16. Brief filed by taxpayer. 9/16/37 copy served on General Counsel.

Dec. 9. Memorandum opinion rendered—Arthur J. Mellott, Division 11. Judgment will be entered for the respondent.

Dec. 10. Decision entered—Arthur J. Mellott, Division 11.

Dec. 23. Petition for review by U. S. Circuit Court of Appeals, 2nd Circuit, with assignments of error filed by taxpayer.

1938.

Jan. 7. Proof of service of petition for review filed by taxpayer.

Jan. 7. Praecipe filed—proof of service thereon.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Filed December 21, 1936

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency MT-ET-[fol. 3] C1-6576—14th New York, Estate of George H. Bunker, dated September 28th, 1936, and as a basis for his proceeding alleges as follows:

First. The petitioner is a corporation duly organized and existing under the laws of the State of New York having its principal place of business at No. 45 Wall Street, Borough of Manhattan, City, County and State of New York, and letters testamentary were duly issued to the petitioner as Executor of the Estate of George H. Bunker, deceased, by the Surrogate's Court of Westchester County, New York, on the 2nd day of January, 1935.

Second. The Notice of Deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on September 28th, 1936.

Third. The taxes in controversy are estates taxes accruing in the calendar year 1934 by reason of decedent's death on December 10th, 1934, and in the amount of Nine Hundred and forty-four and 31/100 ($944.31) Dollars.

Fourth. The determination of taxes set forth in the said Notice of Deficiency is based upon the following error, viz.:

Inclusion in the gross estate of the sum of $10,000 proceeds of United States Government Life Insurance Company (converted war risk insurance) payable to wife of decedent

Fifth. The facts upon which petitioner relies as a basis of this proceeding are as follows:

(a) Decedent during the World War was an officer of the United States Army. As such officer a war risk insurance policy in the amount of $10,000 was issued to him. Subse-[fol. 4] quently pursuant to statute this policy was duly converted by decedent into United States Government life insurance policy No. K 649,770 in the amount of $10,000 payable to the wife of decedent.

(d) The amount of this policy was included in the Estates Tax Return by your petitioner, but was claimed to be non-taxable under Section 28 of the War Risk Insurance Act in effect June 25, 1918 (40 U. S. Stat. at Large, 609 as amended) which statute as far as applicable reads as follows:

"The compensation, insurance, and maintenance and support allowance payable under Parts II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Parts II, III, or IV; and shall be exempt from all taxation."

The policy in question bore upon its face the following clause:

"Section 11. Exempt from Taxation.—The proceeds of this policy are exempt from all taxation."

Wherefore, petitioner prays that this Board may hear the proceeding and vacate Nine hundred and forty-four and 31/100 ($944.31) Dollars.

Wilder Goodwin, Counsel for Petitioner, Office and P. O. Address, 36 West 44th Street, Borough of Manhattan, New York City, N. Y.

Dated, New York, N. Y., December 18th, 1936.

[fol. 5] *Duly sworn to by Benjamin Strong. Jurat omitted in printing.*

[fol. 6] EXHIBIT "A" TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to MT-ET-C1-6576-14th New York, Estate of George H. Bunker.

Date of death: December 10, 1934.

Sep. 28, 1936.

United States Trust Company of New York, Executor, 45 Wall Street, New York, New York.

SIRS:

A deficiency of $944.31 in the Federal estate tax liability of the above-named estate has been determined after a re-

view of the file in the case and a consideration of the protest against a deficiency proposed in a previous letter from this office. The determination of the deficiency and the action of this office on the protest are fully explained in the attached statement.

This notice of deficiency is given in accordance with the provisions of Section 308(a) of the Revenue Act of 1926 as amended by Section 501 of the Revenue Act of 1934, and a petition for a redetermination of the deficiency may be filed with the United States Board of Tax Appeals within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter. If you acquiesce in this determination and do not desire to file a petition with the United States Board of [fol. 7] Tax Appeals, you are requested to execute and forward the enclosed Form 890, waiving the restrictions on the immediate assessment and collection of the deficiency.

The submission of the waiver will expedite the closing of this case and will also benefit the estate by preventing the accumulation of interest charges, as the interest period terminates 30 days after the filing of the waiver or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

If within the 90-day period a petition has not been filed with the United States Board of Tax Appeals or the waiver, Form 890, has not been submitted, the deficiency will be thereafter assessed.

Respectfully, Guy T. Helvering, Commissioner, by D. S. Bliss, Deputy Commissioner.

Enclosures: Statement, Waiver, Form 890.

[fol. 8] Statement Attached to Exhibit "A" to Petition

MT-ET-C1-6576-14th New York.
Estate of George H. Bunker.
Date of death—December 10, 1934.

Statement

The estate's protest is directed against the following:

Insurance	Returned	Tentatively Determined	Determined
Gross Estate			
Item 3—U. S. Government War Risk Insurance Policy No. K648,770..	$0.00	$10,000.00	$10,000.00
All other insurance the taxability of which is conceded by the estate	35,442.87	36,942.87	36,942.87
	35,442.87	46,942.87	46,942.87
Less: Exemption	40,000.00	40,000.00	40,000.00
	0.00	6,942.87	6,942.87

Following the ruling of the United States Board of Tax Appeals in the case of Bankers Trust Company and Hazel B. Fellner, Executors, Estate of Irving S. Fellner v. Commissioner, 33 B. T. A. No. 112, the War Risk Insurance was properly included for tax in the tentative audit. Accordingly no adjustment is made herein.

Deductions			
Executor's commiss	6,121.65	6,121 65	6,874.49
Attorneys' fees	6,805.85	6,805.85	7 883.86
Miscellaneous administration expenses	5,276.25	394.25	1,544.25

On the basis of the evidence of record, adjustments under deductions are deemed warranted as indicated above.

[fol. 9] Accordingly, the following computation shows the Federal estate tax liability which is hereby made final:

Gross estate		$348,372.88
Deductions (1926 Act)		157,575.10
Net estate (1926 Act)		190,797.78
Net estate (1934 Act)		240,797.78
Gross tax (1926 Act)		$4,223.93
Credit for estate or inheritance tax		3,379.14
Net tax (1926 Act)		844.79
Total gross taxes (1926 and 1934 Acts)		24,127.64
Gross tax (1926 Act)		4,223.93
Net additional tax		19,903.71
Net tax (1926 Act)		844.79
Total net tax		20,748.50
Returned tax	$19,411.43	
Amount assessed as deficiency pursuant to waiver	392.76	
		19,804.19
Deficiency		$944.31

The deficiency bears interest at the rate of 6 per centum per annum from one year after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

[fol. 10] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER

The Commissioner of Internal Revenue by his attorney, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, for answer to the petition filed in this proceeding admits and denies as follows:

First and Second. Admits the allegations contained in the paragraphs of the petitioner numbered First and Second.

Third. Admits that the taxes in controversy are estate taxes but denies the remainder of the paragraph of the petition numbered Third.

Fourth. Denies that the determination of the deficiency is based upon errors as alleged in the paragraph of the petition numbered Fourth.

Fifth (a). Admits the allegations contained in subparagraph (a) of the paragraph of the petition numbered Fifth.

Fifth (b). Denies the allegations contained in subparagraph (b) of the paragraph of the petition numbered Fifth.

[fol. 11] Sixth. Denies generally and specifically each and every allegation of the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the appeal be denied.

Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue.

Of Counsel: Eugene G. Smith, Special Attorney, Bureau of Internal Revenue.

EGS:MFH 1/11/37.

[fol. 12] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 87544

UNITED STATES TRUST COMPANY OF NEW YORK, as Executor u/w of George H. Bunker, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Wilder Goodwin, Esq., for the petitioner.
Eugene G. Smith, Esq., for the respondent.

MEMORANDUM OPINION

MELLOTT:

The respondent determined a deficiency in estate tax in the amount of $944.31. The sole issue is whether the proceeds of life insurance issued by the Bureau of War Risk Insurance and payable to the widow of the decedent, should be included in the gross estate of the decedent, a World War veteran, under the provisions of section 302(g) of the Revenue Act of 1926.

The decedent, George H. Bunker, died December 10, 1934. At the time of his death he had a life insurance policy issued under and subject to the provisions of the War Risk Insurance Act and amendments and supplements thereto. The designated beneficiary was the decedent's widow. In determining the deficiency the respondent included in decedent's gross estate the proceeds of this insurance amounting to $10,000. As a result of the inclusion [fol. 13] of this amount in the gross estate, the total life insurance of decedent exceeded the statutory exemption of $40,000 by the amount of $6,942.87. The deficiency here in dispute is the tax upon the said amount of $6,942.87.

The applicable statutory provision is section 302(g) of the Revenue Act of 1926. It provides for the inclusion in the gross estate of the decedent of the amount in excess of $40,000 receivable by beneficiaries as insurance under policies taken out by the decedent upon his own life.

Petitioner contends that section 302(g), supra, does not apply to the proceeds of decedent's War Risk Insurance on the ground that they are exempt from the Federal estate tax under the provisions of the War Risk Insurance Act, as amended, and the World War Veterans Act of 1924. These

acts, or amendments thereto, provide that the proceeds of War Risk Insurance shall be exempt from all taxation. 40 Stat. 609, section 28, 1918; 43 Stat. 613, section 22, 1924; 49 Stat. 609, section 3, 1935.

In Bankers Trust Co. et al., Executors, 33 B. T. A. 746, this Board considered the identical question raised by petitioner in the instant proceeding, and decided that the proceeds of life insurance issued by the Bureau of War Risk Insurance (now known as the Veterans' Administration) constituted a part of the decedent's gross estate for estate tax purposes, even though the World War Veterans Act of 1924, as amended, provided that the insurance paid to a beneficiary of a War Risk Insurance policy was exempt from taxation. To here repeat or attempt to enlarge upon the discussion and reasoning of that decision would serve no useful purpose. It is controlling of the instant proceeding, [fol. 14] and, in our opinion, effectively answers the contentions of petitioner, with one exception which will hereinafter be considered.

Petitioner contends that to tax the proceeds of War Risk Insurance violates the constitutional rights of the beneficiary under the Fifth Amendment to the Constitution of the United States. Petitioner argues that a contract between an individual and the Federal Government is property and under the Fifth Amendment may not be altered or changed without either the consent of the individual or the payment of adequate compensation; that this rule applies to a breach or modification of such a contract by the United States; that the War Risk Insurance policies are contracts of the United States, citing Lynch v. United States, 292 U. S. 571; that one of the terms of such contracts is that they should be exempt from all taxation; that the inclusion of the proceeds of War Risk Insurance in the gross estate of the decedent for the purpose of determining the Federal estate tax is a direct tax on such proceeds; and that such a tax deprived the beneficiary of her constitutional rights. If petitioner were correct in saying that the inclusion of the proceeds of the War Risk Insurance in the gross estate of the decedent constituted a direct tax on such proceeds there might be some merit to its argument. But the Federal estate tax is not a direct tax. It is an excise upon the privilege of transmitting property of a decedent upon his death, the amount of the tax being measured by the value of the property transmitted. Such a tax does not deprive the bene-

ficiary of her constitutional rights under the Fifth Amend-
[fol. 15] ment. Chase National Bank et al. v. United States, 278 U. S. 327; New York Trust Co. v. Eisner, 256 U. S. 346; and Knowlton v. Moore, 178 U. S. 41.

It is our conclusion that respondent did not err in including in the gross estate of the decedent the proceeds of the War Risk Insurance amounting to $10,000.

Judgment will be entered for the respondent.

Enter: —— ——.

Entered Dec. 9, 1937.

BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 87544

UNITED STATES TRUST COMPANY OF NEW YORK, as Executor u/w of George H. Bunker, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

Pursuant to the determination of the Board, as set forth in its Memorandum Opinion, entered December 9, 1937, it is [fol. 16] Ordered and decided: That there is a deficiency in estate tax of $944.31.

Enter.

(Signed) Arthur J. Mellott, Member. (Seal.)

Entered Dec. 10, 1937.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION FOR REVIEW—Filed December 23, 1937

The United States Trust Company of New York, as Executor of George H. Bunker, deceased, the petitioner in this cause, by Wilder Goodwin, counsel, hereby files its petition for a review by the Circuit Court of Appeals for the Second Circuit of the decision by the United States Board of Tax

Appeals rendered on December 10th, 1937, -- B. T. A. --, determining a deficiency in the petitioner's federal estate [fol. 17] tax for the estate of the said George H. Bunker, deceased, in the amount of $944.31, and respectfully shows:

I

The petitioner, United States Trust Company of New York, a banking corporation organized and existing under the laws of the State of New York, with its principal place of business at No. 45 Wall Street, Borough of Manhattan, City, County and State of New York, was duly appointed executor of George H. Bunker, who died a resident of Yonkers, New York, on December 10, 1934, by Letters Testamentary issued to said petitioner by the Surrogate's Court of Westchester County, New York, on January 2, 1935. The petitioner's federal estate tax return for the estate of the said decedent was made on May 24, 1935, to the office of the Collector of Internal Revenue for the Fourteenth New York Collection District.

II

Nature of the Controversy

The controversy involves the determination of the petitioner's liability as such executor of George H. Bunker, deceased, for the federal estate tax on the said estate.

George H. Bunker, the decedent herein, while serving during the World War, took out policy No. K-649,770 of United States Government life insurance in the amount of $10,000. This insurance policy was issued under and subject to the provisions of the War Risk Insurance Act and amendments and supplements thereto. At the time of decedent's death the said policy was payable to the widow of decedent.

[fol. 18] Petitioner did not include this amount of $10,000 as gross taxable income in the federal estate tax return filed in the estate herein as hereinabove set forth. The Commissioner of Internal Revenue, however, determined that pursuant to Section 302(g) of the Revenue Act of 1926 the $10,000 proceeds of the said War Risk Insurance policy should be included in the gross estate of said decedent. The inclusion of the proceeds of the said policy in such gross estate caused the total life insurance of decedent to exceed the statutory exemption of $40,000 by the amount of

$6,942.87. The Commissioner of Internal Revenue consequently determined a deficiency in said federal estate tax of George H. Bunker of $944.31.

The United States Board of Tax Appeals, in its said decision rendered December 10th, 1937, acquiesced in the inclusion by the Commissioner of Internal Revenue of the proceeds of the said War Risk Insurance policy in decedent's said gross estate and decided, confirming the determination of said Commissioner, that there was a deficiency in estate tax of $944.31.

III

The said petitioner, United States Trust Company of New York, as executor of George H. Bunker, deceased, being aggrieved by the conclusions of law contained in the said opinion of the Board subjecting it as such executor to a tax on the proceeds of the said War Risk Insurance policy as hereinabove set forth and by its decision entered pursuant thereto, desires to obtain a review thereof by the Circuit Court of Appeals for the Second Circuit.

[fol. 19] Wherefore, it petitions that a Transcript of Record be prepared in accordance with the rules of the United States Circuit Court of Appeals for the Second Circuit, and transmitted to the Clerk of said Court for filing and appropriate action, to the end that the errors complained of may be reviewed and corrected by the United States Circuit Court for the Second Circuit.

IV

Assignment of Errors

Petitioner assigns as error the following acts and omissions of the Board of Tax Appeals:

1. The holding that proceeds of Government War Risk Insurance, payable to the widow of decedent, are properly included in gross estate of such decedent for the purpose of fixing the federal estate tax on the estate of said decedent.

2. The failure to determine that the taxation of War Risk Insurance violates the constitutional rights of the beneficiary of such a policy under the Fifth Amendment to the Federal Constitution.

3. The finding of a deficiency of $944.31 in the federal estate tax on the estate of said decedent as paid by petitioner as executor of said decedent.

Wilder Goodwin, Counsel for Petitioner, 36 West 44th Street, New York, N. Y.

Dated, New York, N. Y., December 22nd, 1937.

[fol. 20] *Duly sworn to by Wilder Goodwin. Jurat omitted in printing.*

[fol. 21] BEFORE UNITED STATES BOARD OF TAX APPEALS.

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed January 7, 1938

To the Honorable the General Counsel, Washington, D. C.:

Please take notice that the petitioner on the 23rd day of December, 1937, filed with the Clerk of the United States Board of Tax Appeals at Washington, D. C., the foregoing petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the Board heretofore rendered in the above-entitled cause and the assignments of error therein contained.

Dated this 3rd day of January, 1938.

Wilder Goodwin, Counsel for Petitioner, 36 West 44th Street, New York, N. Y.

Personal service of the foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein is hereby acknowledged this 7th day of January, 1938.

(S.) J. P. Wenchel, Counsel for Respondent.

[fol. 22] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

STIPULATION AS TO FACTS—Filed August 5, 1937

It is hereby stipulated between the parties hereto as follows:

1. That decedent died on December 10th, 1934.

2. That the amount of the deficiency assessment in controversy herein is the sum of Nine hundred and forty-four and 31/100 ($944.31) Dollars.

3. That the Treasury Department in its deficiency assessment included in the gross estate of decedent as taxable the proceeds of United States government life insurance policy No. K-649,770 in the amount of Ten thousand ($10,000) Dollars, payable to the widow of decedent.

4. That the said insurance policy was issued under and subject to the provisions of the War Risk Insurance Act and amendments and supplements thereto.

5. That by reason of such inclusion of the proceeds of the policy in the gross estate the total life insurance of decedent [fol. 23] exceeded the statutory exemption of Forty thousand ($40,000) Dollars by the amount of Six thousand nine hundred and forty-two and 87/100 ($6,942.87) Dollars.

6. That the deficiency herein appealed from is the tax upon said sum of Six thousand nine hundred and forty-two and 87/100 ($6,942.87) Dollars.

Wilder Goodwin, Attorney for Petitioner. Morrison Shafroth, Attorney for Bureau of Internal Revenue.

Dated, New York, N. Y., June 16th, 1937.

[fol. 24] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

PRAECIPE FOR RECORD—Filed January 7, 1938

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies, duly certified as correct as required by law and the rules of said Court, of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by United States

Trust Company of New York, as Executor u/w George H. Bunker, Petitioner on Review, to wit:

1. Docket entries of the proceedings before the Board.

[fol. 25] 2. Pleadings before the Board,

(a) Petition, including annexed copy of deficiency letter;
(b) Answer.

3. Opinion and decision of the Board.

4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

5. Stipulation agreeing to the statement of facts.

6. This praecipe.

Wilder Goodwin, Attorney for Taxpayer, 36 West 44th Street, New York, N. Y. J. P. Wenchel, Attorney for Respondent.

Dated, New York, N. Y., January 3rd, 1938.

Service of a copy of the within Praecipe is hereby admitted.

Dated, January 7, 1938.

(S.) J. P. Wenchel, Attorney for Respondent.

[fol. 26] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 27] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1937

Argued May 12, 1938. Decided July 25, 1938

No. 235

UNITED STATES TRUST COMPANY OF NEW YORK, as Executor u/w of George H. Bunker, Deceased, Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from Board of Tax Appeals

Before Manton, Swan, and Chase, Circuit Judges

Petition to review a decision of the Board of Tax Appeals redetermining a deficiency in Federal estate taxes. Affirmed.

Wilder Goodwin, of New York City (Robert C. Flack, of New York City, of counsel), for taxpayer.

Abraham J. Rosenblum, of New York City, amicus curiae for American Legion.

Edward A. Vosseler, of New York City, amicus curiae for American Legion, Department of New York.

James W. Morris, Asst. Atty. Gen., and Sewall Key and Berryman Green, Sp. Assts. to Atty. Gen., for respondent.

CHASE, Circuit Judge:

The sole question at issue is whether the proceeds of a War Risk Insurance policy are includable in the gross estate of the insured for the purpose of computing the estate tax. They are made so includable by the broad language of Sec. 302(g) of the Revenue Act of 1926 (40 Stat. 70), 26 U. S. C. A. § 411(g), which is in accord with similar provisions in prior acts. Sec. 402 (f) of the Revenue Act of 1918 and that of 1921, 40 Stat. 1098, 42 Stat. 279, and Sec. 302(g) of the Revenue Act of 1924, 26 U. S. C. A. § 411 note. The Commissioner has always construed these sections as he did the one here involved to make the proceeds of War Risk Insurance includable in the decedent's gross estate for the

determination of the estate tax. Reg. 37; Art. 32; Reg. 63; Art. 63; Reg. 68; Art. 25. Congress has re-enacted the statute without material change in that respect and thereby given such evidence of its approval of the administrative construction that we are persuaded that the statute does, in so far as it can, provide for the inclusion. The Board, relying mainly upon its previous decision in Bankers Trust Co. et. al., Executors, v. Commissioner, 33 B. T. A. 746, upheld the Commissioner and the executor has brought this petition for review.

The insured was George H. Bunker, a veteran who died December 10, 1934. At the time of his death he held a valid policy of War Risk Insurance in the amount of $10,000 in which his wife was named as the beneficiary. The proceeds of that policy were duly paid to his widow. The deficiency in question was determined by the Commissioner by including that $10,000 in the gross estate of the decedent and finding that when so included such gross estate exceeded the statutory exemption of $40,000 by $6,842.87. The tax computed upon such excess is the one here involved.

As it is plain enough that Congress has attempted to include the proceeds of this insurance in the gross estate of an insured for computing the amount of the estate tax, it remains to be determined whether it had the power to do so. The petitioner says it did not for two reasons. The first is that by the express provisions of Sec. 28 of the War Risk Insurance Act, 40 Stat. 609, insurance payable on such a policy is exempted from taxation; and the second is that the policy was a contract of the United States which created a vested property right and that its taxation would be a [fol. 28] deprivation in violation of the Fifth Amendment, U. S. C. A. Const. Amend. 5. We need not disagree with either premise to reach, as we do, a conclusion contrary to that of the petitioner and in accord with that of the Board of Tax Appeals since neither the policy nor its proceeds have been taxed.

The estate tax is an excise tax upon the right to transfer property upon death. Chase National Bank v. United States, 278 U. S. 327, 49 S. Ct. 126, 73 L. Ed. 405, 63 A. L. R. 388. It is a tax upon the privilege and not upon the property itself. Consequently there is no conflict between the exemption statute and the estate tax statute and no need

to consider whether the latter has in any way modified the former. A close analogy may be found in the gift tax. See Bromley v. McCaughn, 280 U. S. 124, 50 S. Ct. 46, 74 L. Ed. 226; Burnet v. Guggenheim, 288 U. S. 280, 53 S. Ct. 369, 77 L. Ed. 748. And the controlling principle has already been established in respect to estate taxes measured by including tax exempt bonds in the amount upon which the tax is computed. Plummer v. Coler, 178 U. S. 115, 20 S. Ct. 829, 44 L. Ed. 998, and Murdock v. Ward, 178 U. S. 139, 20 S. Ct. 775, 44 L. Ed. 1009. These cases cannot be distinguished on the theory that here some special kind of property was transmitted which in some way makes this a tax on property for "it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested." Knowlton v. Moore, 178 U. S. 41, 56, 20 S. Ct. 747, 753, 44 L. Ed. 969. Further emphasis upon the distinction between a tax upon the property and one upon the privilege of transferring such property may be found in Hamersley v. United States, Ct. Cl., 16 F. Supp. 768, and Phipps v. Commissioner, 10 Cir., 91 F. 2d 627, 112 A. L. R. 1441.

As to the second ground relied on by the petitioner there is little left to be said. Since the proceeds of the policy have not themselves been taxed it cannot be said that anyone has been deprived of a vested contract right. See Chase National Bank v. United States, supra. Indeed, so far as the contract itself is concerned performance was completed when the proceeds of the policy were paid in full to the widow.

Affirmed.

[fol. 29] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 10th day of August, one thousand nine hundred and thirty eight.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

UNITED STATES TRUST COMPANY OF NEW YORK, as Exr., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 30] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States Trust Company of New York vs. Commissioner of Internal Revenue. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 10, 1938. William Parkin, Clerk.

[fol. 31] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 30, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States Trust Company of New York, as Exr., Petitioner, against Commissioner of Internal Revenue, Respondent, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this ninth day of September, in the year of our Lord one thousand nine hundred and thirty-eight, and of the Independence of the said United States the one hundred and sixty-third.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 32] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 5, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Wilder Goodwin. File No. 42,938. U. S. Circuit Court of Appeals, Second Circuit. Term No. 453. United States Trust Company of New York, as Executor u/w of George H. Bunker, deceased, petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed October 31, 1938. Term No. 453, O. T., 1938.

(9382)

FILE COPY

IN THE

Supreme Court of the United States

NOVEMBER TERM, 1938

No. 453

UNITED STATES TRUST COMPANY OF NEW YORK,
as Executor u/w of George H. Bunker, deceased,
Petitioner and Appellant below,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee below.

PETITION OF UNITED STATES TRUST COMPANY OF NEW YORK, AS EXECUTOR u/w OF GEORGE H. BUNKER, DECEASED, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

WILDER GOODWIN,
Counsel for Petitioner,
36 West 44th Street,
New York, N. Y.

The Hecla Press, 225 Varick Street, N. Y. C. Tel. WAlker 5-1480.

SUBJECT INDEX

TABLE OF CASES CITED

STATUTES

IN THE

Supreme Court of the United States

NOVEMBER TERM, 1938

UNITED STATES TRUST COMPANY OF NEW YORK, as Executor u/w of George H. Bunker, deceased, Petitioner and Appellant below, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent and Appellee below.	No.

PETITION OF UNITED STATES TRUST COMPANY OF NEW YORK, AS EXECUTOR OF GEORGE H. BUNKER, DECEASED, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

United States Trust Company of New York, as Executor of George H. Bunker, deceased, prays that a writ of certiorari issue to review the order entered August 10, 1938, in the United States Circuit Court of Appeals for the Second Circuit affirming the decision of the Board of Tax Appeals entered December 10, 1937, in the above entitled cause.

Summary Statement of Matters Involved.

The facts as stipulated and as found by the Board of Tax Appeals are as follows:

The decedent herein while serving in the U. S. Army during the World War took out a Government war risk insurance policy in the amount of $10,000 under the provisions of the War Risk Insurance Act and amendments and sup-

plements thereto. The said policy was payable to decedent's widow at the time of his death. The Commissioner of Internal Revenue determined that, pursuant to Section 302(g) of the Revenue Act of 1926, the proceeds of this policy should be included in the gross estate of said decedent. By reason of the said inclusion of such proceeds in the gross estate, decedent's total life insurance exceeded the statutory exemption of $40,000 by $6,942.87. The deficiency assessment of $944.31 as determined by the Commissioner is the tax upon the said $6,942.87.

This determination of the Commissioner was sustained by the Board of Tax Appeals in a decision listed but not reported in 36 B. T. A. 1271, and subsequently sustained by the United States Circuit Court of Appeals for the Second Circuit in an opinion reported in 98 F. (2d) 734.

Reasons Relied on for Allowance of Writ.

A.

The highest State courts of Minnesota, Ohio, Pennsylvania, West Virginia, Washington and Louisiana have held that the proceeds of war risk insurance policies are not taxable under the transfer, inheritance or estate tax laws of their respective States. These decisions are based on the ground that Congress by the passage of Section 28 of the War Risk Insurance Act, in effect June 28, 1918, as amended June 7, 1924, had made the proceeds of war risk insurance policies exempt from *all* taxation, and that, consequently, the reasoning of *Plummer* v. *Coler*, 178 U. S. 115, *Murdock* v. *Ward*, 178 U. S. 139, and *Chase National Bank* v. *United States*, 278 U. S. 327, upon which the Circuit Court of Appeals based its decision in the instant case, did not apply. So far as known to petitioner, the highest State court of no State has held such proceeds taxable under any State transfer, inheritance or estate tax laws. There is, therefore, in effect a clear conflict in the legal reasoning and the result reached between the decisions of the highest State courts and that of the Circuit Court of Appeals for the Second Circuit in the case at bar.

B.

The decision of the Circuit Court of Appeals in this case is the only decision in any Federal court determining the taxability under the Federal Estate Tax Law of the proceeds of war risk insurance. The amount of money at stake in the present case is admittedly not large, but, as set forth in the annual report of the Administrator of Veteran Affairs for the fiscal year ended June 30, 1937, there were then in force 596,832 United States Government life insurance policies (converted war risk insurance policies), totaling $2,577,982,119. It is obvious, therefore, that the instant case presents an important question of Federal law which has not been, but should be, settled by the Supreme Court of the United States.

The importance of this case to the ex-service men is shown by the fact that, pursuant to authorization by the National Commander, the American Legion duly filed a brief *amicus curiae* in the Circuit Court of Appeals for the Second Circuit when the case was before the said Court. Petitioner is informed and believes that it is the intention of the American Legion also to make application for leave to file such a brief with this Court in connection with this petition for writ of certiorari.

Prayer for Writ.

WHEREFORE, your petitioner now prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full transcript of the record and of the proceedings of said Court had in the case numbered and entitled on its docket

No. 235

UNITED STATES TRUST COMPANY OF NEW YORK,
as Executor u/w of George H. Bunker, deceased,
Petitioner-Appellant,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent,

to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the decision therein of said Circuit Court of Appeals be reversed by this Court, and for such other and further relief as this Court may deem proper.

Dated, New York, N. Y., October 24, 1938.

WILDER GOODWIN,
Counsel for Petitioner and Appellant,
36 West 44th Street,
New York, N.Y.

IN THE

Supreme Court of the United States

NOVEMBER TERM, 1938

UNITED STATES TRUST COMPANY OF NEW YORK, as Executor u/w of George H. Bunker, deceased, Petitioner and Appellant below, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent and Appellee below.	No.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

I.

Opinion of Courts Below.

The opinion in the United States Board of Tax Appeals is listed but not reported in 36 B. T. A. 1271.

The opinion in the Circuit Court of Appeals is reported in 98 F. (2d) 734.

II.

Jurisdiction.

The order of the Circuit Court of Appeals for the Second Circuit appealed from was duly entered August 10, 1938.

Appellate jurisdiction is based upon Section 240 (a) of the Judicial Code as amended January 31, 1928, Chap. 14, Sec. 1 (45 Stat. 54); June 7, 1934, Chap. 426 (48 Stat. 926).

III.

Statement of Case.

The summary statement of matters involved as set forth in the petition for writ of certiorari will suffice as a statement of the case.

IV.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that proceeds of Government war risk insurance, payable to the widow of decedent, are properly included in the gross estate of such decedent for the purpose of fixing the Federal estate tax on the estate of such decedent.

2. In failing to determine that the taxation of war risk insurance proceeds so paid to such beneficiary violates the constitutional rights of said beneficiary under the Fifth Amendment to the Federal Constitution.

3. In sustaining the determination of the Board of Tax Appeals that a deficiency of $944.31 exists in the Federal estate tax on the estate of said decedent as paid by the petitioner as executor of said decedent.

V.

Argument.

The petitioner claims:

I. That Congress intended by the passage of the War Risk Insurance Act to exempt the proceeds of such insurance from all taxation, including the Federal estate tax.

II. The intent of Congress to exempt the proceeds of war risk insurance from all taxation, including the Federal estate tax, would be defeated by the inclusion of such proceeds in

the gross estate of a decedent for the purpose of determining the Federal estate tax, as such inclusion must result in the diminution of the said proceeds in the hands of the beneficiary.

III. The taxation of the proceeds of tax exempt war risk insurance violates the constitutional rights of the beneficiary of such a policy under the Fifth Amendment to the Federal Constitution.

POINT I.

Congress intended by the passage of the War Risk Insurance Act to exempt the proceeds of such insurance from all taxation, including the Federal estate tax.

Section 28 of the War Risk Insurance Act, in effect June 25, 1918 (40 U. S. Stat. at Large 609), was amended June 7, 1924 (Chap. 320, Sec. 22, 43 Stat. 613, 38 U. S. C. A. 454), to read, in part, as follows:

> "The compensation, insurance and maintenance and support allowance payable under Parts 2, 3, and 4 respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Parts 2, 3 or 4; *and shall be exempt from all taxation.*" (Italics ours.)

All the highest State Courts to which the question has been presented have held that the proceeds of war risk insurance are not taxable under State transfer, inheritance or estate taxes because Congress by the passage of the above-quoted Act had made the proceeds of such insurance exempt from *all* taxation, including the said excise taxes. The reasoning of the State cases is equally applicable to Federal estate taxation (*Estate of Harris,* 179 Minn. 450; *Tax Commissioner* v. *Rife,* 119 Ohio St. 83, 162 N. E. 398; *Wanzel's Estate,* 295 Pa. 419; *Watkins* v. *Hall,* 107 W. Va. 202; *Cross Estate,* 152 Wash. 459, 278 Pac. 414; *Succession of Geier,* 155 La. 167, 99 So. 26; notes in 55 A. L. R. 613 *et seq.*; 63 A. L. R. 394 *et seq.*).

The War Risk Insurance Act of 1917 (October 6, 1917, 40 U. S. Stat. at Large 398 *et seq.*), did *not* contain any provision exempting the proceeds of war risk insurance from taxation, although compensation for death or disability payable under another article of said Act was specifically given such exemption (40 U. S. Stat. at Large 405). The War Risk Insurance Act of 1918, *supra*, passed on June 25, 1918, *did* make the proceeds of war risk insurance *exempt* from all taxation. It is significant that, following a message of President Wilson on May 27, 1918, urging the necessity for the enactment of a new revenue bill, public hearings were begun on June 6, 1918, by the Ways and Means Committee of the House of Representatives on the Revenue Act of 1918, which was the first revenue act to include the proceeds of life insurance payable to a named beneficiary in gross estate for the purpose of computing the estate tax. It is reasonable, therefore, to suppose the granting of tax exemption to the proceeds of war risk insurance by the War Risk Insurance Act of 1918 was due to the impending inclusion by the Revenue Act of 1918, *for the first time*, of such insurance proceeds in gross estate.

The Circuit Court of Appeals bases its decision in the instant case primarily on *Plummer* v. *Coler*, 178 U. S. 115, and *Murdock* v. *Ward*, 178 U. S. 139, cases in which this Court upheld the taxation of Federal tax exempt bonds by transfer or succession laws, and on *Chase National Bank* v. *United States*, 278 U. S. 327, in which ordinary commercial life insurance was held taxable under the Federal estate tax law.

As to *Murdock* v. *Ward* and *Plummer* v. *Coler*, *supra*, Day, J., in a case which gives a good example of the general reasoning of the State cases above cited, *Tax Commissioner* v. *Fife*, *supra*, 119 Ohio St. 83, at 91 *et seq.*, has this to say:

> "Of course, such obligations reciting the ordinary relationship of debtor and creditor between the government and the holder thereof are like any other property of a decedent, and pass as any other assets of his estate, and are therefore rightly subject to state

> inheritance tax. However, the proceeds of War Risk Insurance are a definite kind of property of a soldier's estate. * * * This distinct class of property by Federal enactment is not subject to the claims of creditors, or taxation, and is solely for the benefit of the soldier and his dependents and next of kin. Such assets pass under and by virtue of the federal act, and the decision of *Plummer's Exr.* v. *Coler, Compt.*, supra, and *Murdock's Exr.* v. *Ward,* supra, do not relate to property of that character."

These cases can further be distinguished from the instant case in that the Government bonds held therein subject to excise tax were not exempt from the claims of creditors as are the proceeds of war risk insurance. Congress cannot have intended that this exemption should not apply to the claim of an executor of the estate which would be the case if the insurance policies are included in the gross estate. The *Chase National Bank* case, *supra*, is also not controlling, as it dealt only with ordinary commercial life insurance, which may be irrevocably assigned by the policyholder, while war risk insurance is specifically, by Section 28 of the War Risk Insurance Act, *supra,* not assignable by the holder at all. The right of the policyholder of such a policy to prevent change in its terms, e. g., as by revocation of the tax exemption therein contained, is, moreover, a property right (*Lynch* v. *United States,* 292 U. S. 571), which property right was entirely lacking in the *Chase National Bank* case.

Is it reasonable to suppose that Congress while specifically providing that the proceeds of war risk insurance should "be exempt from all taxation," intended such proceeds to be taxed under the Federal estate tax, particularly as the only taxes which could be imposed on the proceeds of an insurance policy are estate or inheritance taxes, excise taxes which Congress must have had in mind in granting the tax exemption?

POINT II.

The intent of Congress to exempt the proceeds of war risk insurance from all taxation, including the Federal estate tax, would be defeated by the inclusion of such proceeds in the gross estate of a decedent for the purpose of determining the Federal estate tax, as such inclusion must result in the diminution of the said proceeds in the hands of the beneficiary.

The Circuit Court of Appeals has held in the instant case that, pursuant to Section 302 of the Revenue Act of 1926 (February 26, 1926, Chap. 27, Sec. 302, 44 Stat. 70), the proceeds of war risk insurance are to be included in the gross estate of a decedent for the purpose of determining the Federal estate tax.

Under Section 315(b) of the Revenue Act of 1926 as amended [February 26, 1926, Chap. 27, Sec. 315(b), 44 Stat. 80; June 6, 1932, Chap. 209, Sec. 803(c), 47 Stat. 280; 26 U. S. C. A. 427(b)], the transferee of any insurance policy included in the gross estate is personally liable up to the full amount of the policy for any unpaid estate taxes, irrespective of the proportion the proceeds of such policy may bear to the total taxable estate. The tax is a lien for ten years on any insurance included in the gross estate [February 26, 1926, Chap. 27, Sec. 315(a), 44 Stat. 80; May 29, 1928, Chap. 852, Sec. 613(b), 45 Stat. 876; June 6, 1932, Chap. 209, Sec. 809, 47 Stat. 283; 26 U. S. C. A. 427(a)]. If, however, the executor pays the tax in full so that no lien any longer attaches in favor of the Government on the proceeds of such policy, the beneficiary still cannot keep the entire proceeds of the policy. Section 314(b) of the Revenue Act of 1926 [February 26, 1926, Chap. 27, Sec. 314(b), 44 Stat. 79] specifically gives the executors the right in this case to recover—and a right given an executor to recover money for the estate becomes of course a legal duty—from the beneficiary his or her proportion of the tax paid. Once the proceeds of war risk insurance are included in gross

estate, therefore, such proceeds are certain to be diminished in the hands of the beneficiary, either by suit of the Government or of the executor. It will be recalled that Section 28 of the War Risk Insurance Act specifically provides that the proceeds of such insurance are exempt from the claims of creditors. If the decision of the Circuit Court of Appeals in the instant case stands, under Section 314(b) of the Revenue Act of 1926 this provision is nullified by the right of action against such beneficiary given to the executor. Surely no such result as this was contemplated by Congress in enacting the said Section 28 of the War Risk Insurance Act.

POINT III.

The taxation of the proceeds of tax-exempt war risk insurance violates the constitutional rights of the beneficiary of such a policy under the Fifth Amendment to the Federal Constitution.

As shown in Point II, *supra,* the inclusion of the proceeds of war risk insurance in gross estate of a decedent inevitably results in the diminution of such proceeds in the hands of the beneficiary. Such diminution is a clear breach by the Government of the provisions in the original contract of insurance granting exemption from all taxation. This point is well expressed by Mr. Justice Brandeis in his opinion for a unanimous court in another case involving an attempted but unsuccessful breach by the Government of its contractual obligations to the beneficiaries of war risk insurance (*Lynch* v. *United States,* 292 U. S. 571, at 578-579):

> "But no power to curtail the amount of the benefits which Congress contracted to pay was reserved to Congress and none could be given by any regulation promulgated by the Administrator.
>
> The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United

States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment [citing *United States* v. *Central Pacific R. R. Co.*, 118 U. S. 235, and *United States* v. *Northern Pacific Ry. Co.*, 256 U. S. 51]. When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

CONCLUSION.

It is respectfully submitted that, for the foregoing reasons, the writ of certiorari should issue as prayed for.

Dated, New York, N. Y., the 24th day of October, 1938.

Respectfully submitted,

WILDER GOODWIN,
Attorney for Petitioner and Appellant,
Office and P. O. Address,
No. 36 West 44th Street,
Borough of Manhattan,
New York City.

ROBERT C. FLACK,
of Counsel.

APPENDIX.

evenue Act of 1918, Sec. 402(f)—40 U. S. Stat. at Large, 1098:

(f) To the extent of the amount receivable by the executor s insurance under policies taken out by the decedent upon is own life; and to the extent of the excess over $40,000 of ie amount receivable by all other beneficiaries as insurance nder policies taken out by the decedent upon his own life.

evenue Act of 1926, Sec. 302(g)—Chap. 27, Sec. 302, 44 Stat. 70:

The value of the gross estate of the decedent shall be de- ermined by including the value at the time of his death of l property, real or personal, tangible or intangible, * * *

(g) To the extent of the amount receivable by the executor s insurance under policies taken out by the decedent on his wn life; and to the extent of the excess over $40,000 of the mount receivable by all other beneficiaries as insurance nder policies taken out by the decedent upon his own life.

evenue Act of 1926, Sec. 314(b)—Feb. 26, 1926, Chap. 27, 314(b), 44 Stat. 79:

(b) If the tax or any part thereof is paid by, or collected it of that part of the estate passing to or in the possession , any person other than the executor in his capacity as ich, such person shall be entitled to reimbursement out of ay part of the estate still undistributed or by a just and uitable contribution by the persons whose interest in the tate of the decedent would have been reduced if the tax ad been paid before the distribution of the estate or whose terest is subject to equal or prior liability for the payment taxes, debts, or other charges against the estate, it being e purpose and intent of this title that so far as is prac- cable and unless otherwise directed by the will of the de- dent the tax shall be paid out of the estate before its dis-

tribution. If any part of the gross estate consists of proceeds or policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.

Revenue Act of 1926, Sec. 315(a) (as amended)—Feb. 26, 1926, Chap. 27, Sec. 315(a), 44 Stat. 80; May 29, 1928, Chap. 852, Sec. 613(b), 45 Stat. 876; June 6, 1932, Chap. 209, Sec. 809, 47 Stat. 283, 26 U. S. C. A. 427(a):

Upon gross estate. Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any or all property of such estate from the lien herein imposed.

Revenue Act of 1926, Sec. 315(b) (as amended)—Feb. 26, 1926, Chap. 27, Sec. 315(b), 44 Stat. 80; June 6, 1932, Chap. 209, Sec. 803(c), 47 Stat. 280:

SECTION 315. (b) If (1) except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the decedent makes a transfer, by trust or otherwise, of any property in contemplation of or intended to take effect in possession or enjoyment at or after his death, or makes a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the possession or enjoyment of, or the right to the income from, the property,

or (B) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom, or (2) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interests under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for an adequate and full consideration of money or money's worth.

U. S. Constitution, Fifth Amendment—U. S. C. A., Const., Part 2, pp. 483, 517:

No person shall * * * be deprived of life, liberty, or property without due process of law.

War Risk Insurance Act of 1917, Sec. 311—40 U. S. Stat. at Large, 408:

That compensation under this article shall not be assignable, and shall be exempt from attachment and execution and from all taxation.

War Risk Insurance Act of 1918—June 7, 1924, Chap. 320, 43 Stat. 613, 38 U. S. C. A. 454:

Assignability and Exempt Status of Compensation, Insurance, and Maintenance and Support Allowances.

The compensation, insurance and maintenance and support allowance payable under Parts II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made

under Parts II, III or IV, and shall be exempt from all taxation. Such compensation, insurance and maintenance and support allowance shall be subject to any claims which the United States may have, under Parts II, III, IV and V, against the person on whose account the compensation insurance, or maintenance and support allowance is payable.

The provisions of this section shall not be construed to prohibit the assignment by any person to whom converted insurance shall be payable under Part III of this chapter of his interest in such insurance to any other member of permitted class of beneficiaries.

SUBJECT INDEX.

APPENDIX—

TABLE OF CASES CITED.

STATUTES.

MISCELLANEOUS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 453.

UNITED STATES TRUST COMPANY OF NEW YORK, as Executor u/w of George H. Bunker, deceased,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S BRIEF ON CERTIORARI.

I.

Opinions of Courts Below.

The opinion in the United States Board of Tax Appeals is listed but not reported in 36 B. T. A. 1271 (R. pp. 7-9). The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 98 F. (2d) 734 (R. pp. 15-17).

II.

Jurisdiction.

The order of the Circuit Court of Appeals for the Second Circuit appealed from was duly entered August 10, 1938. Petition for writ of certiorari was duly brought pursuant to Section 240(a) of the Judicial Code as amended January 31, 1928, Chapter 14, Section 1 (45 Stat. 54); June 7, 1934, Chapter 426 (48 Stat. 926). A writ of certiorari was granted by order of this Court dated December 5, 1938 (R. p. 19).

III.

Statement of the Case.

The facts as stipulated and as found by the Board of Tax Appeals are as follows:

The decedent herein while serving in the U. S. Army during the World War took out a Government war risk insurance policy in the amount of $10,000 under the provisions of the War Risk Insurance Act and amendments and supplements thereto. The said policy was payable to decedent's widow at the time of his death. The Commissioner of Internal Revenue determined that, pursuant to Section 302(g) of the Revenue Act of 1926, the proceeds of this policy should be included in the gross estate of said decedent. By reason of the said inclusion of such proceeds in the gross estate, decedent's total life insurance exceeded the statutory exemption of $40,000 by $6,942.87. The deficiency assessment of $944.31 as determined by the Commissioner is the tax upon the said $6,942.87.

This determination of the Commissioner was sustained by the Board of Tax Appeals in a decision listed but not

reported in 36 B. T. A. 1271, and subsequently sustained by the United States Circuit Court of Appeals for the Second Circuit in an opinion reported in 98 F. (2d) 734, (R. pp. 15-17).

IV.

Question Presented.

The sole question presented is: Whether the proceeds of United States Government war risk insurance paid to the widow of insured as the named beneficiary in the policy should be included in the gross estate of the insured for the purpose of computing the Federal estate tax.

V.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that proceeds of Government war risk insurance, payable to the widow of decedent, are properly included in the gross estate of such decedent for the purpose of fixing the Federal estate tax on the estate of such decedent.

2. In failing to determine that the taxation of war risk insurance proceeds so paid to such beneficiary violates the constitutional rights of said beneficiary under the Fifth Amendment to the Federal Constitution.

3. In sustaining the determination of the Board of Tax Appeals that a deficiency of $944.31 exists in the Federal estate tax on the estate of said decedent as paid by the petitioner as executor of said decedent.

VI.

ARGUMENT.

Summary.

The petitioner claims:

I. That Congress intended by the passage of the War Risk Insurance Act to exempt the proceeds of such insurance from all taxation, *including* the Federal estate tax.

II. The intent of Congress to exempt the proceeds of war risk insurance from all taxation, including the Federal estate tax, would be defeated by the inclusion of such proceeds in the gross estate of a decedent for the purpose of determining the Federal estate tax, as such inclusion *must* result in the diminution of the said proceeds in the hands of the beneficiary.

III. The taxation of the proceeds of tax exempt war risk insurance violates the constitutional rights of the beneficiary of such a policy under the Fifth Amendment to the Federal Constitution.

POINT I.

Congress intended by the passage of the War Risk Insurance Act to exempt the proceeds of such insurance from all taxation, including the Federal Estate Tax.

Section 28 of the War Risk Insurance Act, in effect June 25, 1918 (40 U. S. Stat. at Large 609), amended June 7, 1924 (Chap. 320, Sec. 22, 43 Stat. 613, 38 U. S. C. A. 454), which was the controlling statute at the time of the death of decedent herein (Dec. 10, 1934) and at

he time of the payment of his war risk insurance policy, eads, in part, as follows:

> "The compensation, insurance, and maintenance and support allowance payable under Parts II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Parts II, III, or IV; *and shall be exempt from all taxation.*" (Italics ours.)

The decision of the Circuit Court of Appeals in this ase is the only decision in any Federal court determining he taxability under the Federal Estate Tax Law of the roceeds of war risk insurance.*

All the highest State courts to which the question has een presented have held that the words above italicized ean exactly what they say, i. e., the proceeds of war risk nsurance are not taxable under State transfer, inheritance r estate taxes because Congress by the passage of the bove quoted Act had made the proceeds of such insurance xempt from *all taxation,* including the said excise taxes. he reasoning of the State cases is equally applicable to ederal estate taxation (*Estate of Harris,* 179 Minn. 450, 29 N. W. 781; *Tax Commissioner* v. *Rife,* 119 Ohio St. 3, 162 N. E. 398; *Wanzel's Estate,* 295 Pa. 419, 145 A. 12; *Watkins* v. *Hall,* 107 W. Va. 202, 147 S. E. 876; *ross Estate,* 152 Wash. 459, 278 Pac. 414; *Succession of eier,* 155 La. 167, 99 So. 26; notes in 55 A. L. R. 613 *seq.,* 63 A. L. R. 394 *et seq.*).

It is true that in some of these cases the decisions were ased in part on the ground that the insurance proceeds d not pass from the decedent to the beneficiary under

* This question was not even presented to the Board of Tax Appeals til 1935 in the case of *Bankers Trust Company et al., Executors,* v. *Commissioner,* 33 B. T. A. 746.

State laws of descent and distribution, but rather under the contract and the Federal law. We submit, however, that the true *ratio decidendi* of the State cases was that Congress for reasons of public policy in war time had made the proceeds of such insurance exempt from all taxation, including all excise taxation. This point is well brought out in the words of Olsen, C., in *Estate of Harris*, 179 Minn. 450, at p. 454:

> "In view of the purpose of Congress to provide insurance, partly at government expense and in the nature of compensation, pension or bonus, partly for the benefit of the insured soldier, but largely for the benefit of his surviving dependents within the permitted class, it is no strained construction to hold that the legislative intent was to exempt the payments provided from all taxation, whether a property or an inheritance tax.
>
> "The law is well established that an inheritance tax is not a property tax, and that exemption from property taxes does not exempt from an inheritance tax; but Congress no doubt has the power to exempt soldiers' compensation, pensions and allowances paid by the Federal government even from inheritance taxes, particularly so where same are paid under contract to a particular class of beneficiaries and do not pass by will or under state intestate laws."

In New York a few decisions of the lower courts (*Matter of Sabin*, 224 App. Div. 702; *Matter of Schaeffer*, 130 Misc. 436; *Matter of Dean*, 131 Misc. 125) have held that when the insurance proceeds do not pass to a named beneficiary of the policy, but, through the failure to name a beneficiary or through the death of the named beneficiary, fall into the general estate of the insured, they are taxable under the State transfer tax law. None of

the above cases reached the Court of Appeals. No case in that State has held taxable the proceeds of war risk insurance payable to a surviving named beneficiary.

The War Risk Insurance Act of 1917 (Oct. 6, 1917; 40 U. S. Stat. at Large 398 *et seq.*) did *not* contain any provision exempting the proceeds of war risk insurance from taxation, although compensation for death or disability payable under another article of said Act was specifically given such exemption (40 U. S. Stat. at Large 405). The War Risk Insurance Act of 1918, *supra*, passed on June 25, 1918, *did* make the proceeds of war risk insurance *exempt* from all taxation. It is significant that, following a message of President Wilson on May 27, 1918, urging the necessity for the enactment of a new revenue bill, public hearings were begun on June 6, 1918, by the Ways and Means Committee of the House of Representatives on the Revenue Act of 1918, which was the first revenue act to include the proceeds of life insurance payable to a named beneficiary in gross estate for the purpose of computing the estate tax. It is reasonable, therefore, to conclude the granting of tax exemption to the proceeds of war risk insurance by the War Risk Insurance Act of 1918 was due to the impending inclusion by the Revenue Act of 1918, *for the first time*, of such insurance proceeds in gross estate.

The Circuit Court of Appeals bases its decision in the instant case chiefly on *Plummer* v. *Coler*, 178 U. S. 115, and *Murdock* v. *Ward*, 178 U. S. 139 (R. p. 17), cases in which this Court upheld the taxation of Federal tax exempt bonds by transfer or succession laws, and on *Chase National Bank* v. *United States*, 278 U. S. 327, in which ordinary commercial life insurance was held taxable under the Federal Estate Tax Law.

As to *Murdock* v. *Ward* and *Plummer* v. *Coler, supra,* Day, J., in *Tax Commissioner* v. *Rife,* 119 Ohio St. 83 at 91 *et seq.,* has this to say:

> "Of course, such obligations reciting the ordinary relation of debtor and creditor between the government and the holder thereof are like any other property of a decedent, and pass as any other assets of his estate, and are therefore rightly subject to state inheritance tax. However, the proceeds of War Risk Insurance are a definite kind of property, differing from the ordinary property of a soldier's estate, and are in the nature of a beneficence or gratuity, bounty or pension, affecting the rights of the soldier and his dependents, upon one side, and the government of the United States, as a part of its war policy, upon the other side. This distinct class of property by Federal enactment is not subject to the claims of creditors, or taxation, and is solely for the benefit of the soldier and his dependents and next of kin. Such assets pass under and by virtue of the federal act, and the decisions in the cases of *Plummer's Exr.* v. *Coler, Compt., supra,* and *Murdock's Exr.* v. *Ward, supra,* do not relate to property of that character."

This decision affirms the decision in the same case before the Ohio Court of Appeals (27 Ohio App. 516) in which Cushing, J., at page 521, used the following pertinent language:

> "Counsel for the tax commission quote from *State ex rel.* v. *Ferris,* 53 Ohio St. 314, at page 325, 41 N. E. 579, 580 (30 L. R. A. 218), where the court said: 'Properly understood, it is not the right to transmit, but the right and privilege to receive, that is taxed.'

> "We do not question this statement, but, whether it is the property or the right of succession that is taxed, a part of the proceeds of the policy is thus being diverted from those to whom the government said it should go, and paid to the state of Ohio as a tax. In our view, the statute of the United States, which provides that this insurance shall be exempt from all taxation, controls."

Murdock v. *Ward* and *Plummer* v. *Coler* should further be distinguished from the instant case in that the Government bonds, the transfer of which these cases held to be subject to excise tax, were not exempt from the claims of creditors as are the proceeds of war risk insurance. Congress in granting this exemption from the claims of creditors to the proceeds of such insurance cannot have intended that the said exemption should not apply to the claim of an executor of the estate against a beneficiary of such a policy for recoupment of the amount of the tax paid by the estate, which would be the case if the proceeds of the said insurance policies are included in gross estate (as argued more fully in Point II, *infra*). The *Chase National Bank* case, *supra*, is also not controlling, dealing as it did only with ordinary commercial life insurance which may be irrevocably assigned by the policyholder and is subject to the claims of creditors, both of which features are entirely lacking, by Section 28 of the War Risk Insurance Act, *supra*, from war risk insurance. The insurance policy in the *Chase National Bank* case, of course, contained no tax exemption and the case is authority only for the proposition that ordinary commercial life insurance payable to a named beneficiary may be deemed part of the gross estate.

The essential difference between ordinary commercial life insurance and war risk insurance is clearly stated in

the opinion of Witmer, J., in *Cassarello* v. *United States,* 271 F. 486 at 491, aff'd C. C. A. (3rd Cir.), 279 F. 396, where he uses the following language in regard to the nature of war risk insurance:

> "Senator Williams, in charge of the bill in the Senate, made use of the following language:
>
> 'It (the government) is not going into the insurance business at all. In the first place, it has confined its activities to the soldiers and the sailors in the service. In the second place, it confines the beneficiaries to the soldiers' and sailors' dependent families.' Cong. Record, vol. 55, pt. 8, Oct. 3, 1917, p. 7690.
>
> "Comptroller Warwick, in an opinion to the Secretary of the Treasury, July 5, 1919, said:
>
> 'This insurance feature of the law is not an out-and-out contract of insurance on an ordinary business basis; neither is it a pension, but it partakes of the nature of both.'
>
> "Both Senator Williams and Comptroller Warwick here touched upon a vital distinction to be borne in mind, that this is neither a pension nor insurance. It partakes in some respects of the nature of both. It is not governed by the law of either. It is governed by the statute creating it, and must be construed in accordance therewith."

In the decision below the Circuit Court of Appeals also cited (R. p. 17) *Hammersley* v. *United States,* 16 F. Supp. 768 (C. Cls.), certiorari denied 300 U. S. 659, and *Phipps* v. *Commissioner,* 91 F. (2d) 627 (C. C. A. 10th), certiorari denied 302 U. S. 742, holding that gifts of United States bonds issued under a statute exempting them from all taxation except estate or inheritance taxes are includable in the measure of the gift tax. These cases add noth-

ing to the doctrine established by *Plummer* v. *Coler* and *Murdock* v. *Ward, supra,* i. e., that an excise tax is not a property tax. In the *Phipps* case, 91 F. (2d) 627, moreover, the holding that a tax might be levied on a gift of the bonds, although exempt from all taxation except "estate or inheritances taxes," was at page 629 predicated on the reasoning that the gift tax was "cognate" to the estate tax (citing *Burnet* v. *Guggenheim,* 288 U. S. 280 at 287), so that the above specific exception to the tax exemption in the words of the statute could be readily held to cover the gift tax as well.

The opinion of the Circuit Court of Appeals below suggests that because Congress re-enacted the War Risk Insurance Act without material change as to the tax exemption feature after the Treasury Regulations had held the proceeds of such insurance includable in gross estate, Congress by implication approved the said inclusion (R. p. 16). An examination of the Regulations in question, however, will disclose that war risk insurance is not referred to at all (see Art. 27, Treasury Regulations 70 and 80, Appendix, pp. 21, 22). The implication, if any, is a purely negative one, because the said articles of the various Regulations are silent as to the inclusion of war risk insurance in gross estate. The fact that the Treasury Regulations failed specifically to include in, or to exclude from, gross estate the proceeds of war risk insurance, clearly would not put Congress on notice that the Treasury Department was attempting to tax proceeds of insurance, which, we believe, Congress had intended to make entirely tax exempt, both as to direct and indirect taxes, by the War Risk Insurance Act.

The fundamental question in this case is what did Congress intend by enacting that the proceeds of war risk insurance should be "exempt from all taxation"? From

what taxes could Congress intend to give exemption? Until the death of the insured under a life insurance policy there is no taxable *res*. The only taxes which, therefore, could be imposed by the Federal Government on the proceeds of an insurance policy whose holder had died were estate or inheritance taxes, *excise taxes,* which Congress must have had in mind in granting the tax exemption, as the only taxes which could reduce the payment to the veteran's beneficiary which the Government had contracted to make. We submit, consequently, that because of the inherent nature of war risk insurance—insurance which as defined in *Cassarello* v. *United States* (*supra*) partakes of the nature both of a *pension* and of insurance—Congress never intended to levy such an excise tax upon the proceeds.

POINT II.

The intent of Congress to exempt the proceeds of war risk insurance from all taxation, including the Federal estate tax, would be defeated by the inclusion of such proceeds in the gross estate of a decedent for the purpose of determining the Federal estate tax, as such inclusion must result in the diminution of the said proceeds in the hands of the beneficiary.

The Circuit Court of Appeals has held in the instant case that, pursuant to Section 302 of the Revenue Act of 1926 (Feb. 26, 1926, Chap. 27, Sec. 302, 44 Stat. 70), the proceeds of war risk insurance are to be included in the gross estate of a decedent for the purpose of determining the Federal estate tax.

Under Section 315(b) of the Revenue Act of 1926 as amended [Feb. 26, 1926, Chap. 27, Sec. 315(b), 44 Stat. 80; June 6, 1932, Chap. 209, Sec. 803(c), 47 Stat. 280;

26 U. S. C. A. 427(b)] the transferee or beneficiary of any insurance policy included in the gross estate is personally liable up to the full amount of the policy for any unpaid estate taxes, *irrespective* of the proportion the proceeds of such policy may bear to the total taxable estate. The tax is a lien for ten years on any insurance included in the gross estate [Feb. 26, 1926, Chap. 27, Sec. 315(a), 44 Stat. 80; May 29, 1928, Chap. 852, Sec. 613(b), 45 Stat. 876; June 6, 1932, Chap. 209, Sec. 809, 47 Stat. 283; 26 U. S. C. A. 427(a)]. If, however, the executor pays the tax in full so that no lien any longer attaches in favor of the Government on the proceeds of such policy, the beneficiary still cannot keep the entire proceeds of the policy. Section 314(b) of the Revenue Act of 1926 (Feb. 26, 1926, Chap. 27, Sec. 314(b), 44 Stat. 79) specifically gives the executor the right in this case to recover from the beneficiary his or her proportion of the tax paid. It is a mandatory legal duty of an executor to enforce the right so given to him for the benefit of the estate, and in the instant case to collect the tax from the widow, should the decision of the Circuit Court be upheld. Once the proceeds of war risk insurance are included in gross estate, therefore, such proceeds are certain to be diminished in the hands of the beneficiary, either by suit of the Government or of the executor. It will be recalled that Section 28 of the War Risk Insurance Act specifically provides that the proceeds of such insurance are exempt from the claims of *creditors*. If the decision of the Circuit Court of Appeals in the instant case stands, under Section 314(b) of the Revenue Act of 1926 this provision is nullified by the right of action against such beneficiary given to the executor. Surely no such result as this was contemplated by Congress in enacting the said Section 28 of the War Risk Insurance Act.

POINT III.

The taxation of the proceeds of tax-exempt war risk insurance violates the constitutional rights of the beneficiary of such a policy under the Fifth Amendment to the Federal Constitution.

As shown in Point II, *supra*, the inclusion of the proceeds of war risk insurance in gross estate of a decedent inevitably results in the diminution of such proceeds in the hands of the beneficiary. Such diminution is a clear breach by the Government of the provisions in the original contract of insurance granting exemption from all taxation. This point is well expressed by Mr. Justice Brandeis in his opinion for a unanimous court in another case involving an attempted but unsuccessful breach by the Government of its contractual obligations to the beneficiaries of war risk insurance (*Lynch* v. *United States*, 292 U. S. 571 at 578-579):

> "But no power to curtail the amount of the benefits which Congress contracted to pay was reserved to Congress and none could be given by any regulation promulgated by the Administrator. * * *
>
> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. *United States* v. *Central Pacific R. Co.*, 118 U. S. 235, 238, and *United States* v. *Northern Pacific Ry. Co.*, 256 U. S. 51, 64, 67. When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the decision of the Court below that there is a deficiency in estate tax of $944.31 should be reversed.

Dated, New York, N. Y., December 30, 1938.

Respectfully submitted,

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ROBERT C. FLACK,
on the Brief.

APPENDIX.

Revenue Act of 1918, Sec. 402 (f)—40 U. S. Stat. at Large 1098:

(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

Revenue Act of 1926, Sec. 302 (g)—Chap. 27, Sec. 302, 44 Stat. 70:

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, * * *

(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent on his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

Revenue Act of 1926, Sec. 314 (b)—Feb. 26, 1926, Chap. 27, Sec. 314 (b), 44 Stat. 79:

(b) If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed

or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this sub-chapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution. *If any part of the gross estate consists of proceeds or policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary, the executor shall be entitled to recover from such beneficiaries in the same ratio.* (Italics ours.)

Revenue Act of 1926, Sec. 315 (a) (as amended)—Feb. 26, 1926, Chap. 27, Sec. 315 (a), 44 Stat. 80; May 29, 1928, Chap. 852, Sec. 613 (b), 45 Stat. 876; June 6, 1932, Chap. 209, Sec. 809, 47 Stat. 283, 26 U. S. C. A. 427 (a):

Upon gross estate. Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any or all property of such estate from the lien herein imposed.

Revenue Act of 1926, Sec. 315 (b) (as amended)—Feb. 26, 1926, Chap. 27, Sec. 315 (b), 44 Stat. 80; June 6, 1932, Chap. 209, Sec. 803 (c), 47 Stat. 280:

Section 315. (b) If (1) except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the decedent makes a transfer, by trust or otherwise, of any property in contemplation of or intended to take effect in possession or enjoyment at or after his death, or makes a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (a) the possession or enjoyment of, or the right to the income from, the property, or (b) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom, or (2) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interests under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for an adequate and full consideration of money or money's worth.

U. S. Constitution, Fifth Amendment—U. S. C. A., Const., Part 2, pp. 483, 517:

No person shall * * * be deprived of life, liberty, or property without due process of law.

War Risk Insurance Act of 1917, Sec. 311—40 U. S. Stat. at Large 408:

That compensation under this article shall not be assignable, and shall be exempt from attachment and execution and from all taxation.

War Risk Insurance Act of 1918—June 7, 1924, Chap. 320, Sec. 22, 43 Stat. 613, 38 U. S. C. A. 454:

Assignability and Exempt Status of Compensation, Insurance, and Maintenance and Support Allowances.

The compensation, insurance, and maintenance and support allowance payable under Parts II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Parts II, III, or IV, and shall be exempt from all taxation. Such compensation, insurance, and maintenance and support allowance shall be subject to any claims which the United States may have, under Parts II, III, IV, and V, against the person on whose account the compensation, insurance, or maintenance and support allowance is payable.

The provisions of this section shall not be construed to prohibit the assignment by any person to whom converted insurance shall be payable under Part III of this chapter of his interest in such insurance to any other member of the permitted class of beneficiaries.

Treasury Regulations 70, promulgated under the Revenue Act of 1926:

Art. 27. *Insurance receivable by other beneficiaries.*

All insurance in excess of $40,000 receivable by beneficiaries other than the estate must be included in the gross estate of any decedent dying after the effective date of the Revenue Act of 1918, except that where the decedent died subsequent to the effective date of the Revenue Act of 1918, but prior to the effective date of the Revenue Act of 1924, the proceeds of insurance policies taken out by him upon his own life payable to beneficiaries other than to or for the benefit of the decedent's estate, are not includable in the gross estate if the beneficiary receiving the proceeds became such prior to the effective date of the Revenue Act of 1918, and thereby acquired, prior to the effective date of the Revenue Act of 1918, a vested interest in the proceeds of the policy, under the State law governing the rights or interest of the beneficiary.

Insurance payable to beneficiaries other than the estate, or for the benefit of the estate, need not be included in the gross estate of a decedent who died before the effective date of Title IV of the Revenue Act of 1918, but where, subsequent to September 8, 1916, such a decedent assigned a policy of insurance payable to or for the benefit of his estate, or caused it to be made payable to a specific beneficiary in contemplation of or intended to take effect in possession or enjoyment at or after his death, the entire proceeds should be included if such assignment or change in beneficiary did not amount to a bona fide sale for a fair consideration in money or money's worth. (See Articles 15 to 21, inclusive.)

The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the

estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in Schedule C of Form 706. The word "beneficiaries," as used in reference to the $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

Treasury Regulations 80 (1934 Ed.), Art. 27, promulgated under the Revenue Act of 1926, as amended by the Revenue Acts of 1928, 1932 and 1934:

Art. 27. *Insurance receivable by other beneficiaries.*

The statute requires the inclusion in the gross estate of the decedent of the proceeds of any policy, or the aggregate proceeds of all policies, not receivable by or for the benefit of decedent's estate, to the extent that such proceeds exceed $40,000, regardless of when the policy was or the policies were issued, if the decedent possessed at the time of his death any of the legal incidents of ownership.

The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in Schedule C of Form 706. The word "beneficiaries," as used in reference to the $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

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INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 453

UNITED STATES TRUST COMPANY OF NEW YORK, AS EXECUTOR U/W OF GEORGE H. BUNKER, DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 12–15) is unreported. The opinion of the Circuit Court of Appeals (R. 27–29) is reported in 98 F. (2d) 734.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 10, 1938. (R. 30.) The petition for a writ of certiorari was filed October

31, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the proceeds of a War Risk Insurance policy on the life of the decedent payable to his widow are required to be included in his gross estate under the provisions of Section 302 (g) of the Revenue Act of 1926.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are found in the Appendix, *infra*, pp. 15–19.

STATEMENT

The facts as stipulated (R. 22–23) and as found by the Board of Tax Appeals (R. 12–13) are substantially as follows:

The decedent, George H. Bunker, died on December 10, 1934. (R. 22.)

At the time of his death he held a life insurance policy issued under and subject to the provisions of the War Risk Insurance Act and amendments and supplements thereto. The designated beneficiary was the decedent's widow. (R. 12, 22.)

The Commissioner of Internal Revenue included in the decedent's gross estate for estate tax purposes the proceeds of this insurance, amounting to $10,000. By reason of this inclusion of the proceeds of this policy in the gross estate the total life in-

surance of the decedent exceeded the statutory exemption of $40,000 by $6,942.87, and a deficiency in tax in the amount of $944.31 was asserted. (R. 12–13, 22–23)

The Board of Tax Appeals held that the proceeds of the policy in question were properly included in the gross estate and sustained the Commissioner's determination of the deficiency in issue. Upon appeal the Circuit Court of Appeals affirmed the Board's decision.

Argument

The sole question in this case is whether there is required to be included in the decedent's gross estate the sum of $10,000 representing the proceeds of a War Risk Insurance policy taken out by the decedent and made payable to his wife. The question arises in this case only by virtue of the fact that when that sum is added to the proceeds of other insurance policies payable to named beneficiaries the total exceeds the statutory exemption of $40,000 granted by Section 302 (g) of the Revenue Act of 1926 (Appendix, *infra*, p. 15).

The Circuit Court of Appeals and the Board of Tax Appeals held that the proceeds of the War Risk Insurance policy should be included in the gross estate. The decision is in accord with *Bankers Trust Co.* v. *Commissioner*, 33 B. T. A. 746, and is not in conflict with any other decision of any Federal court.

It is clear that the proceeds of the policy in question are not exempt under any provision of the estate tax law. Section 302 (g) of the Revenue Act of 1926, *infra*, plainly requires the inclusion in the decedent's gross estate of the amount of all insurance proceeds under policies taken out by the decedent upon his own life, except that an exemption of $40,000 is allowed against the total proceeds payable to persons other than the executor. Prior statutes have contained similar provisions. See Section 402 (f) of the Revenue Acts of 1918 and 1921 (c. 18, 40 Stat. 1057, 1098; c. 136, 42 Stat. 227, 279), and Section 302 (g) of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 305). The regulations of the Treasury Department have consistently construed Section 302 (g) and the corresponding provisions of other statutes as including all forms of life insurance without exception, and the reenactment of the statute without substantial change is persuasive evidence of legislative approval of the administrative construction.[1] *Morrissey* v. *Helvering*, 296 U. S. 344; *Mass. Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488; *Hassett* v. *Welch*, 303 U. S. 303.

[1] The regulation here involved is Article 27 of Regulations 80 (Appendix, *infra*, p. 18). For regulations under prior Acts, see Article 32 of Regulations 37 (1921 Ed.), Article 27 of Regulations 63 (1922 Ed.), Article 25 of Regulations 68 (1924 Ed.), and Article 25 of Regulations 70 (1926 and 1929 Ed.).

The petitioner does not argue otherwise but contends that the proceeds are exempt under Section 22 of the World War Veterans' Act of 1924 (Appendix, *infra*, p. 15), which provides in part—

> That the compensation, insurance, and maintenance and support allowance payable under Titles II, III, and IV, respectively, * * * shall be exempt from all taxation * * *.

It will be noted that this section was repealed by Section 3 of the Act of August 12, 1935 (Appendix, *infra*, p. 16). That section, which was made retroactive by Section 5 of the Act, *infra*, provides in part as follows:

> Payments of benefits due or to become due * * * shall be exempt from taxation * * *.

It is not believed, however, that the slight change in language affects the case in any way. In *Lawrence* v. *Shaw*, 300 U. S. 245, 249, this Court stated that the second statute was intended to clarify the former rather than to change its purpose, and in this case the same result should be reached, whether the first or the second statute is relied upon. Under the first statute it is provided that the "insurance" shall be exempt from "all taxation" and under the second that "Payments of benefits due or to become due" shall be "exempt from taxation". As applied to insurance, both statutes mean that no tax shall be imposed on the proceeds.

We submit the the court below properly held that the tax imposed in this case was not a tax on the proceeds of the pol cy or on the policy itself, but was an excise tax imposed upon the privilege of transferring the property at death. It is well-settled that the Federal estate tax is an excise tax imposed upon the transfer of property at death or upon what may reasonably be regarded as a substitute for such a transfer. See *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 347; *Tyler* v. *United States*, 281 U. S. 497, 502; *Milliken* v. *United States*, 283 U. S. 15, 23, 24; *Porter* v. *Commissioner*, 288 U. S. 436, 444. And in *Chase Nat. Bank* v. *United States*, 278 U. S. 327, this Court not only held that the estate tax generally was an excise tax on the privilege of transferring property at death, but specifically held that to require the proceeds of insurance policies payable to named beneficiaries to be included in the gross estate was not to impose a tax on the proceeds or the policies. The inclusion of the proceeds of the War Risk Insurance policy in the gross estate, for the purpose of measuring the estate tax, accordingly does not involve imposing a tax on either the proceeds or the policy. Section 22 of the World War Veterans' Act (Appendix, *infra*, p. 15) forbids only a tax on the proceeds or the policy.

This conclusion is supported by *Murdock* v. *Ward*, 178 U. S. 139, in which it was held that the value of Federal bonds was properly included in

the measure of a Federal inheritance tax, notwithstanding the fact that the bonds were issued under a Federal statute exempting the bonds from all taxation. The Court there held that the promise of the Government to refrain from taxing the bonds was not a promise to refrain from imposing an inheritance tax, where the estate consisted of such bonds. On the same day as the decision in that case the imposition of a New York State inheritance tax on a transfer of Federal bonds, which by statute were exempted from all taxes imposed by the United States or any State, was upheld on the ground that the tax was laid on the privilege of acquiring property by inheritance and not upon the bonds themselves. *Plummer* v. *Coler*, 178 U. S. 115.

More recently the courts have held that since the gift tax is imposed upon the privilege of transferring property by gift and not upon the property itself (*Bromley* v. *McCaughn*, 280 U. S. 124, 136–137; *Burnet* v. *Guggenheim*, 288 U. S. 280, 287), a gift of United States bonds issued under a statute exempting the bonds, both as to principal and interest, from all taxation except estate or inheritance taxes is required to be included in the measure of the gift tax. *Hamersley* v. *United States*, 16 F. Supp. 768 (C. Cls.), certiorari denied, 300 U. S. 659; *Phipps* v. *Commissioner*, 91 F. (2d) 627 (C. C. A. 10th), certiorari denied, 302 U. S. 742; see also 112 A. L. R. 1441.

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The petitioner argues that those decisions do not apply for the reason that in this case there was no transfer of any property by virtue of any laws relating to inheritance, succession, descent, or transfer of the decedent's property, but that it passed solely by the contract of insurance with the Federal Government. But a similar argument was made by the taxpayer and was rejected by this Court in *Chase Nat. Bank* v. *United States, supra.* In that case the Court, in holding that the tax was imposed on the transfer and was not a direct tax, said (p. 337):

> But the plaintiffs say that the tax here must be deemed to be a tax on property because the beneficiaries' interests in the policies were not transferred to them from the decedent, but from the insurer, and hence there was nothing to which a transfer or privilege tax could apply. Obviously, the word "transfer" in the statute, or the privilege which may constitutionally be taxed, cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It must, we think, at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another.

It is true that the contract of insurance in that case was made with a commercial insurance company and that in this case it was made with the

Federal Government, but we cannot see how that distinction affects the nature of the tax imposed.[2] In the *Chase Nat. Bank* case, as in this case, the payment of the proceeds depended upon the contract and not upon any state laws regulating the descent and distribution of property. If there was a transfer in that case, there was equally a transfer in this case; and if the tax imposed with respect to the life insurance proceeds in that case was not a direct tax, it is not a direct tax here.

The petitioner argues further that whether the tax be denominated a direct tax or an indirect tax, it is a tax on the proceeds of War Risk Insurance because the collection of the tax may use up the entire proceeds. It points to Section 315 (b) of the Revenue Act of 1926, as amended by Section 803 (c) of the Revenue Act of 1932, c. 209, 47 Stat. 169 (U. S. C., Title 26, Sec. 427 (b)), making the beneficiary of an insurance policy liable for any unpaid estate tax imposed with respect to the insurance, and to Section 315 (a) of the Revenue Act of 1926, as amended by Section 613 (b) of the Revenue Act of 1928, c. 852, 45 Stat. 791, and by Section 809 of the Revenue Act of 1932 (U. S. C., Title 26,

[2] The petitioner does not argue that there were other differences in the two contracts which make the *Chase Nat. Bank* case, *supra*, inapplicable, and we can think of none that affect the applicability of that decision to this case. See *Lynch* v. *United States*, 292 U. S. 571, 576–577; *White* v. *United States*, 270 U. S. 175, 180; *Lewis* v. *United States*, 56 F. (2d) 563 (C. C. A. 3d).

Sec. 427), making the tax a lien for ten years on the gross estate of the decedent. It also refers to Section 314 (b) of the Revenue Act of 1926 (U. S. C., Title 26, Sec. 426 (b)), which enables executors, after payment of estate taxes, to secure reimbursement of a proportionate part of the tax from beneficiaries of insurance policies over $40,000 in amount.

So far as the contention is based upon the liability of the beneficiary to the Government for unpaid taxes, the simple answer is that it has not been shown that any such liability will be enforced in this case. The executor is personally liable for the estate tax and it may be collected from any assets in his hands or any assets distributed to the beneficiaries, regardless of the nature of the property included in the gross estate. The estate tax is not an aggregation of separate taxes but a single tax based upon percentages of the net taxable value of the whole estate. *Guettel* v. *United States*, 95 F. (2d) 229, 230 (C. C. A. 8th), certiorari denied, October 10, 1938, No. 47, present Term. And, so far as the contention rests on the proposition that the beneficiary is liable to the executor for a proportionate part of the estate tax paid by the executor out of the assets in his hands, it is evident that this does not alter the character of the tax. It remains one imposed on the transfer and not on the property, whether or not the executor is reimbursed by the beneficiary of the insurance policy. Finally,

even if the tax should be paid out of the actual proceeds of the War Risk Insurance, this fact could not serve to show that the tax was imposed upon the proceeds rather than the transfer. *Plummer* v. *Coler, supra,* 138; see *United States* v. *Perkins,* 163 U. S. 625, 629–630.

The petitioner claims that there is a conflict between the decision of the court below in this case and decisions of various state courts holding that War Risk Insurance proceeds are not subject to state inheritance, estate or transfer taxes. It is obvious that whatever the state courts may have held as to the applicability of their state inheritance or transfer taxes to War Risk Insurance proceeds, their decisions on that question and the decision of the court below dealing with the question whether such proceeds may be included in the gross estate for Federal estate tax purposes cannot be said to present a direct conflict which this Court is called upon to resolve. The Federal estate tax law is based upon a concept of a transfer which differs from that commonly employed in state inheritance and estate tax laws, and is imposed because the decedent's death has transferred or brought into being property rights. See *Tyler* v. *United States, supra,* 503. The difference is disclosed by the very fact that those of the state courts which have held that their inheritance, estate or transfer tax did not apply to the proceeds of War Risk Insurance have done so not alone because of the exemption of the

Federal statute but also because the insurance proceeds did not pass from the decedent to the beneficiary under state laws of descent and distribution, but passed under the contract and the Federal law. See *Tax Comm.* v. *Rife*, 119 Ohio St. 83; *In re Estate of Harris*, 179 Minn. 450; *Watkins* v. *Hall*, 107 W. Va. 202; *Wanzell's Estate*, 295 Pa. 419. See also *In re Cross' Estate*, 152 Wash. 459; *Succession of Geier*, 155 La. 167. Whatever may be the rule in those States as to the necessity of having a transfer of property directly from the decedent in order to justify a state transfer tax, such a transfer is nat required to justify the Federal estate tax. *Chase Nat. Bank* v. *United States, supra.* It is significant that the New York death transfer tax, which is closely analogous to the Federal estate tax, has been held applicable to the payment of War Risk Insurance. *Matter of Sabin*, 224 App. Div. 702, reversing 131 Misc. 451; *Matter of Schaeffer*, 130 Misc. 436; *Matter of Dean*, 131 Misc. 125.

Petitioner suggests that hearings on the bill which subsequently became the Revenue Act of 1918 had begun when the War Risk Insurance Amendments Act of June 25, 1918 (c. 104, 40 Stat. 609), was passed, and that the Revenue Act of 1918 was the first statute to contain a provision for taxing insurance payable to specific beneficiaries (Section 402 (f)). Because of this, the petitioner urges that in exempting the proceeds of war risk insurance from tax Congress had in mind the estate tax.

It cites no legislative history in support of this view, and, indeed, the contention is contradicted by the implications of the Committee reports.[5] In any event, exemptions from taxation are strictly construed. *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232; *Phipps* v. *Commissioner, supra; Bank of Commerce* v. *Tennessee*, 161 U. S. 134; *Millsaps College* v. *Jackson*, 275 U. S. 129. An asserted exemption will be denied unless it is granted by the statute in plain terms. *United States Trust Co. of New York* v. *Anderson*, 65 F. (2d) 575 (C. C. A. 2d), certiorari denied, 290 U. S. 683; *Phipps* v. *Commissioner, supra; Trotter* v. *Tennessee*, 290 U. S. 354.

The petitioner further suggests (Pet. 3) that the case is of great public importance in view of the fact that there were 596,832 War Risk Insurance policies outstanding on June 30, 1937. It is clear that those figures afford no indication as to how often the question involved in this case will arise in the future, for the reason that no insurance payable to specific beneficiaries is required to be

[5] The House Report (No. 576, 65th Cong., 2d Sess.) is silent. The Senate Report (No. 428, 65th Cong., 2d Sess.) appends the testimony of Assistant Secretary of the Treasury Love before the Senate Committee on Finance who explained (p. 22) the exemption feature as designed simply to include allotments and allowances in the exemptions theretofore granted in the case of compensation and insurance (see Act of October 6, 1917, c. 105, 40 Stat. 398, sec. 311, cf. sec. 402). The Committee reports on this earlier bill do not discuss the exemption feature. See H. Rept. No. 130, S. Rept. No. 141, H. Rept. No. 197, 65th Cong., 1st Sess.

included in the gross estate unless the total exceeds $40,000. In view of that fact, and because only one other case involving this question has previously arisen (*Bankers Trust Co.* v. *Commissioner, supra*) we do not believe that the question is of general importance.

Finally, the constitutional question which the petitioner seeks to raise as to whether the United States may repudiate a contractual obligation is not involved in this case. The sole question is whether a statute exempting the proceeds of a War Risk Insurance policy from tax should be construed as prohibiting the inclusion of such proceeds in the gross estate of the decedent for estate tax purposes. In the court below, the Government relied wholly upon the construction of the statute, and that is all that the court decided.

CONCLUSION

The decision of the court below is correct and is not in conflict with any other decision. The petition should be denied.

Respectfully submitted.

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NOVEMBER, 1938.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9, 71:

SEC. 302. [As amended by Sec. 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680.] [1] The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated except real property situated outside the United States—

* * * * *

(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

* * * * *

[U. S. C., Title 26, Sec. 411.]

World War Veterans' Act of June 7, 1924, c. 320, 43 Stat. 607, 613:

SEC. 22. That the compensation, insurance, and maintenance and support allowance payable under Titles II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Titles II, III, or IV; and shall be exempt

[1] The amendment changed only the portion of Section 302 preceding the subdivisions and related to the exclusion of real property situated outside the United States.

from all taxation: *Provided*, That such compensation, insurance, and maintenance and support allowance shall be subject to any claims which the United States may have, under Titles II, III, IV, and V, against the person on whose account the compensation, insurance, or maintenance and support allowance is payable.

That the provisions of this section shall not be construed to prohibit the assignment by any person to whom converted insurance shall be payable under Title III of such Act of his interest in such insurance to any other member of the permitted class of beneficiaries.

(U. S. C., Title 38, Sec. 454.)

Act of August 12, 1935, c. 510, 49 Stat. 607, 609, amending World War Veterans' Act of June 7, 1924:

SEC. 3. Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. Such provisions shall not attach to claims of the United States arising under such laws nor shall the exemption herein contained as to taxation extend to any property purchased in part or wholly out of such payments. Section 4747 of the Revised Statutes and section 22 of the World War Veterans' Act, 1924, are hereby repealed, and all other Acts inconsistent herewith are hereby modified accordingly. The provisions of this section shall not be

construed to prohibit the assignment by any person, to whom converted insurance shall be payable under title III of the World War Veterans' Act, 1924, of his interest in such insurance to any other member of the permitted class of beneficiaries.

[U. S. C. Supp. III, Title 38, Sec. 454a.]

SEC. 5. That this Act shall take effect and be in force from and after its passage, but the provisions hereof shall apply to payments made heretofore under any of the Acts mentioned herein.

[U. S. C. Supp. III, Title 38, Sec. 454a.]

Treasury Regulations 70, promulgated under the Revenue Act of 1926:

ART. 27. *Insurance receivable by other beneficiaries.*—All insurance in excess of $40,000 receivable by beneficiaries other than the estate must be included in the gross estate of any decedent dying after the effective date of the Revenue Act of 1918, except that where the decedent died subsequent to the effective date of the Revenue Act of 1918, but prior to the effective date of the Revenue Act of 1924, the proceeds of insurance policies taken out by him upon his own life payable to beneficiaries other than to or for the benefit of the decedent's estate, are not includable in the gross estate if the beneficiary receiving the proceeds became such prior to the effective date of the Revenue Act of 1918, and thereby acquired, prior to the effective date of the Revenue Act of 1918, a vested interest in the proceeds of the policy under the State law governing the rights or interest of the beneficiary.

Insurance payable to beneficiaries other than the estate, or for the benefit of the es-

tate, need not be included in the gross estate of a decedent who died before the effective date of Title IV of the Revenue Act of 1918, but where, subsequent to September 8, 1916, such a decedent assigned a policy of insurance payable to or for the benefit of his estate, or caused it to be made payable to a specific beneficiary in contemplation of or intended to take effect in possession or enjoyment at or after his death, the entire proceeds should be included if such assignment or change in beneficiary did not amount to a bona fide sale for a fair consideration in money or money's worth. (See Articles 15 to 21, inclusive.)

The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total, $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in Schedule C of Form 706. The word "beneficiaries," as used in reference to the $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

Treasury Regulations 80 (1934 Ed.), promulgated under the Revenue Act of 1926, as amended by the Revenue Acts of 1928, 1932, and 1934:

ART. 27. *Insurance receivable by other beneficiaries.*—The statute requires the inclusion in the gross estate of the decedent of the proceeds of any policy, or the aggregate proceeds of all policies, not receivable by or for the benefit of decedent's estate, to the extent that such proceeds exceed $40,000, regardless of when the policy was or the pol-

icies were issued, if the decedent possessed at the time of his death any of the legal incidents of ownership.

The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total, $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in Schedule C of Form 706. The word "beneficiaries," as used in reference to the $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

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FILE COPY

No. 453

In the Supreme Court of the United States

OCTOBER TERM, 1938

UNITED STATES TRUST COMPANY OF NEW YORK, AS EXECUTOR U/W OF GEORGE H. BUNKER, DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 7–9) is unreported. The opinion of the Circuit Court of Appeals (R. 15–17) is reported in 98 F. (2d) 734.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 10, 1938 (R. 18). The petition for a writ of certiorari was filed October 31,

1938 (R. 19), and was granted December 5, 1938 (R. 19). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether statutes which exempt War Risk Insurance from taxation prevent the inclusion of the proceeds of such policies in the gross estate for estate-tax purposes under Section 302 (g) of the Revenue Act of 1926.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are found in the Appendix, *infra*, pp. 33–41.

STATEMENT

The facts as stipulated (R. 12–13) and as found by the Board of Tax Appeals (R. 7–9) are substantially as follows:

The decedent, George H. Bunker, died on December 10, 1934 (R. 12).

At the time of his death he held a life insurance policy issued under and subject to the provisions of the War Risk Insurance Act and amendments and supplements thereto. The designated beneficiary was the decedent's wife (R. 13).[1]

The Commissioner of Internal Revenue included in the decedent's gross estate for estate tax purposes the proceeds of this insurance, amounting to

[1] According to the petition (R. 2) the policy was a converted War Risk Insurance Policy, No. K649770.

$10,000. By reason of the inclusion of those proceeds in the gross estate the total life insurance of the decedent exceeded the statutory exemption of $40,000 by $6,942.87, and a deficiency in tax in the amount of $944.31 was asserted (R. 13).

The Board of Tax Appeals held that the proceeds of the policy in question were properly included in the gross estate and sustained the Commissioner's determination of the deficiency in issue. Upon appeal the Circuit Court of Appeals affirmed the Board's decision (R. 18).

SUMMARY OF ARGUMENT

The sole question involved in this case is whether there is required to be included in the decedent's gross estate the sum of $10,000 representing the proceeds of a War Risk Insurance policy taken out by the decedent and made payable to his wife. The question arises only by virtue of the fact that when that sum is added to the proceeds of other policies payable to specific beneficiaries, the total exceeds the statutory exemption of $40,000 granted by Section 302 (g) of the Revenue Act of 1926.

It is clear that Congress has attempted to require the inclusion of the proceeds of such policies in the gross estate, for Section 302 (g) in terms applies to all forms of insurance. Prior statutes have contained similar provisions, and the regulations of the Treasury Department, while containing no specific reference to such policies, have consistently construed Section 302 (g) and the corresponding

provisions of previous statutes as including all forms of life insurance without exception. The re-enactment of the statute without substantial change is persuasive evidence of the legislative approval of the administrative construction.

The petitioner does not contend otherwise, but claims that the proceeds are exempt by virtue of Section 22 of the World War Veterans' Act, 1924, which provides that insurance payable under that Act shall be exempt from all taxation. It is questionable whether that statute or Section 3 of the Act of August 12, 1935, which provides that payments of benefits due or to become due shall be exempt from taxation, is the controlling statute. But it is not believed the change in language affects this case. As applied to insurance, both statutes mean that no tax shall be imposed on the proceeds of the policy.

The Government concedes that a direct tax on the proceeds or the policy is prohibited by this legislation. The questions to be decided are whether the Federal estate tax here involved is a direct tax; and if not, whether it is nevertheless prohibited by the exemption legislation.

It is well settled that the Federal estate tax is not a direct tax but an excise tax imposed upon the transfer of the net estate upon the death of the decedent. Hence the inclusion of the value of any specific property in the gross estate does not mean that the property itself is taxed but merely that its

value becomes a part of the measure of the tax upon the transfer. Moreover, this Court has specifically held that to include the proceeds of an insurance policy payable to designated beneficiaries in the gross estate is not to impose a tax on the policy or the proceeds, provided that there is a shifting of economic benefits at death which justifies the imposition of a transfer tax. The petitioner does not argue that there was not a shifting of economic benefits at the death of the decedent sufficient to justify the imposition of a transfer tax. Hence it is clear that the tax involved in this case is not a tax on the proceeds or the policy.

This court has hitherto held that statutes prohibiting the taxation of property or contracts do not bar the subsequent imposition of Federal or State transfer taxes measured in part by the value of such property or contracts. Those decisions are controlling here.

The petitioner relies upon certain decisions of State courts holding that the proceeds of War Risk Insurance policies are not subject to State inheritance or succession taxes. We submit that those cases are not controlling, both because the State statutes there involved contained no express provision requiring the proceeds of any insurance policies payable to specific beneficiaries to be included in the measure of the tax and because the concept of a transfer implicit in the laws of those States differed from that developed under the Fed-

eral estate tax law. The decisions referred to stressed the fact that the proceeds passed to the recipient under the contract, and not by will or under intestacy laws, and those courts did not have occasion to decide whether, if there had been a specific provision requiring the proceeds to be included in the gross estate, the exempting legislation would have prohibited the tax.

The petitioner also relies upon Section 315 (a) (Appendix, *infra*, p. 33) making the estate tax a lien for ten years on the gross estate; upon Section 315 (b), *infra*, placing a lien upon insurance payable to a specific beneficiary and making the beneficiary liable for the tax, if it is not otherwise paid; and upon Section 314 (b), *infra*, enabling the executors after payment of estate taxes to secure reimbursement of a proportionate amount of the tax from the beneficiary. It is suggested that by virtue of these provisions the proceeds of the policy received by the beneficiary of a War Risk Insurance policy will be diminished and that Congress did not intend this result. But it cannot be taken for granted that the proceeds will bear a part of the tax. And even if they do, it cannot be assumed that Congress did not intend the proceeds to be diminished in this way, in view of the large exemptions granted in the Federal estate tax laws themselves. There is nothing in the War Risk Insurance legislation or in its legislative history which supports the petitioner's suggestion. Con-

gress merely expressed its purpose to exempt the proceeds from taxation, and the tax here involved is not a tax on the proceeds. Exemptions from taxation are to be strictly construed and cannot be enlarged by implication.

No constitutional question is presented in this case. The question is whether the tax here involved is prohibited by the statute, and not whether the United States may repudiate its obligation under the contract with the veteran.

ARGUMENT

THE AMOUNT PAID TO THE BENEFICIARY OF THE WAR RISK INSURANCE POLICY TAKEN OUT BY THE DECEDENT ON HIS LIFE IS REQUIRED TO BE INCLUDED IN HIS GROSS ESTATE FOR FEDERAL ESTATE-TAX PURPOSES

The sole question involved in this case is whether there is required to be included in the decedent's gross estate the sum of $10,000 representing the proceeds of a War Risk Insurance policy taken out by the decedent and made payable to his wife. The question arises only by virtue of the fact that when that sum is added to the proceeds of other policies payable to designated beneficiaries the total exceeds the statutory exemption of $40,000 granted by Section 302 (g) of the Revenue Act of 1926 (Appendix, *infra*, p. 32.[2] The court below held, as did the

[2] Even then no estate tax would have been imposed under the Revenue Act of 1926 had the net estate not exceeded $50,000. See Section 301 (a) (U. S. C., Title 26, Sec. 410). But additional estate taxes imposed under Section 401 of

Board of Tax Appeals, that the proceeds of the policy were required to be included in the gross estate under Section 302 (g). See also *Bankers Trust Co.* v. *Commissioner*, 33 B. T. A. 746.

As the court below stated, it is plain enough that Congress has attempted to require the inclusion of the proceeds of such policies in the gross estate, for Section 302 (g), *infra*, in terms, applies to all forms of insurance. That section provides that the value of the decedent's gross estate shall include insurance proceeds—

> To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

Prior statutes have contained similar provisions. See Section 402 (f) of the Revenue Acts of 1918 (c. 18, 40 Stat. 1057, 1098) and 1921 (c. 136, 42 Stat. 227, 229), and Section 302 (g) of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 305). The regulations of the Treasury Department have never contained a specific reference to War Risk Insurance policies,

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the Revenue Act of 1932, c. 209, 47 Stat. 169, as amended by Section 405 of the Revenue Act of 1934, c. 277, 48 Stat. 680 (U. S. C., Title 26, Sec. 535) reached net estates in excess of $10,000. In this case the gross estate was $348,372.88 (R. 5), of which only $6,942.87 represented insurance in excess of $40,000 (R. 5).

but they have consistently construed Section 302 (g) of the statute here involved and the corresponding provisions of previous statutes as including all forms of life insurance without exception, and the reenactment of the statute without substantial change is persuasive evidence of legislative approval of the administrative construction (*Morrissey* v. *Helvering*, 296 U. S. 344; *Mass. Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488; *Hassett* v. *Welch*, 303 U. S. 303).[3]

The petitioner does not in fact argue that the language of Section 302 (g) excludes the proceeds of War Risk Insurance policies. Its argument is that the proceeds are exempt under Section 22 of the World War Veterans' Act of June 7, 1924 (Appendix, *infra*, p. 35), which provides in part—

> That the compensation, insurance, and maintenance and support allowance payable under Titles II, III, and IV, respectively * * * shall be exempt from all taxation: * * *

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[3] The regulations here involved are Articles 25 and 27 of Regulations 80 (Appendix, *infra*, pp. 39–40). For regulations under prior Acts, see Articles 27 and 29 of Regulations 63 (1922 Ed.); Articles 25 and 27 of Regulations 68 (1924 Ed.); and Articles 25 and 27 of Regulations 70 (1926 Ed.), Appendix, *infra*, p. 37. See, also, Articles 32 and 34 of Regulations 37 (1921 Ed.). Some of these regulations were amended by Treasury Decisions but not in any way that affects this controversy. See T. D. 3945, V–2 Cumulative Bulletin 228; T. D. 4242, VII–2 Cumulative Bulletin 354.

We think it is questionable whether that statute is the controlling statute. War Risk Insurance was first provided for by Sections 400 to 405 of Article IV of the Act of October 6, 1917, c. 105, 40 Stat. 398, 409–411, hereinafter called the War Risk Insurance Act. That Act contained no provision exempting the proceeds of policies from taxation.[4] But Section 2 of the Act of June 25, 1918 (Appendix, *infra*, p. 34), adding Section 28 to the War Risk Insurance Act, provided that insurance payable under Article IV should be exempt from all taxation. This Act was repealed by Section 601 of the World War Veterans' Act, 1924 (c. 320, 43 Stat. 607, 629) which, in Section 22 (Appendix, *infra*, p. 35) contained a new provision to the same effect. The latter section was in turn repealed by Section 3 of the Act of August 12, 1935 (Appendix, *infra*, p. 36). But the same section, which was made retroactive by Section 5, *infra*, provided that—

> Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, * * *.

[4] Compare Section 311, which provided that compensation payable under Article III should not be assignable and should be exempt from all taxation, with Section 402, which provided merely that insurance should not be assignable and should not be subject to the claims of creditors.

The decedent in this case died December 10, 1934 (R. 12), while Section 22 of the World War Veterans' Act, *infra*, was in effect. But since that statute was subsequently repealed and Section 3 of the Act of August 12, 1935, *infra*, was made applicable to payments already made, it is conceivable that the latter statute controls. It is not believed, however, that the slight change in language affects the case in any way. Under the first statute it is provided that the "insurance" shall be exempt from "all taxation," and under the second that "Payments of benefits * * * made to, or on account of, a beneficiary * * * shall be exempt from taxation * * *." In *Lawrence* v. *Shaw*, 300 U. S. 245, 249, this Court stated that the second statute was intended to clarify the former rather than to change its purpose. As applied to insurance both clearly mean that no tax shall be imposed on the proceeds.

The Government concedes that a direct tax on the proceeds or the policy is barred by this legislation. Hence the questions to be decided are whether the Federal estate tax here involved is a direct tax on the proceeds or the policy, and if it is not, whether it is nevertheless prohibited by the exempting legislation.

1. The character of the Federal estate tax is well settled. It is an excise tax and not a direct tax. *Greiner* v. *Lewellyn*, 258 U. S. 384; *United States* v. *Woodward*, 256 U. S. 632; *New York Trust Co.*

v. *Eisner*, 256 U. S. 345; *Chase Nat. Bank* v. *United States*, 278 U. S. 327. The tax is imposed upon the transfer of the net estate upon the death of the decedent. *Edwards* v. *Slocum*, 264 U. S. 61; *Y. M. C. A.* v. *Davis*, 264 U. S. 47; *Nichols* v. *Coolidge*, 274 U. S. 531. Hence the inclusion of the value of any specific property in the gross estate does not mean that that property is itself taxed, but merely that its value becomes a part of the measure of the tax upon the transfer. *Chase Nat. Bank* v. *United States*, *supra*. See also *Keeney* v. *New York*, 222 U. S. 525. That is merely a step in the calculation. *Porter* v. *Commissioner*, 288 U. S. 436. It is upon that theory that this Court has sustained the inclusion in the measure of the tax of what reasonably may be regarded as substitutes for testamentary transfers, even though there is no transfer of title at death. *Helvering* v. *City Bank Co.*, 296 U. S. 85; *Porter* v. *Commissioner*, *supra*; *Milliken* v. *United States*, 283 U. S. 15.

Not only has this Court held generally that the estate tax is not a direct tax imposed upon the items that comprise the gross estate, but it has held specifically that to include the proceeds of an insurance policy payable to designated beneficiaries in the gross estate is not to impose a tax on the policy or on the proceeds, because there is a shifting of economic benefits at death which justifies the imposition of a transfer tax. *Chase Nat.*

Bank v. *United States, supra.* We submit that that decision is controlling authority as to the nature of the tax imposed here, and hence that the tax is not a tax on the policy or on the proceeds. There is no material difference in the statutes involved in the two cases. Compare Section 402 (f) of the Revenue Act of 1921, *supra*, with Section 302 (g) of the Revenue Act of 1926 (Appendix, *infra*, p. 32). The petitioner does not argue that there was not a shifting of economic benefits at the death of the decedent sufficient to justify the imposition of a transfer tax, and it points to no differences between the commercial insurance contract involved in the *Chase Nat. Bank* case and the War Risk Insurance policy involved in this case which would make that decision inapplicable. The petitioner does suggest that the War Risk Insurance has some of the elements of a bounty and some of a contract (citing *Cassarello* v. *United States*, 279 Fed. 396 (C. C. A. 3d)). But it is a bounty only in the sense that the Government has charged insufficient premiums to take care of the cost. This Court has held that it is a contract, though not one entered into for profit by the Government. *United States* v. *Worley*, 281 U. S. 339; *White* v. *United States*, 270 U. S. 175; *Lynch* v. *United States*, 292 U. S. 571. In so far as the insured is concerned, there is no distinction. He purchased the insurance and was obliged to pay premiums to keep it in force (*Smith* v. *United States*, 292 U. S. 337), though he secured it at a bar-

gain price. Upon his death there was a transfer of property procured through expenditures by him with the purpose, effected at his death, of having it pass to another. *Chase Nat. Bank* v. *United States, supra,* Cf. *Lang* v. *Commissioner,* 304 U. S. 264.

If, therefore, the tax in this case is prohibited, it must be upon the theory that the exemption provisions of the War Risk legislation prohibit not only a direct tax on the proceeds, but also an indirect tax on the transfer of the net estate of the decedent measured in part by the proceeds of War Risk Insurance policies.

2. This Court has hitherto held that statutes prohibiting the taxation of property or contracts do not bar the imposition of transfer taxes measured in part by the value of such property or contracts. Thus, in *Plummer* v. *Coler,* 178 U. S. 115, there was involved a statute authorizing the issuance of Federal bonds which provided that "all of which said several classes of bonds and the interest thereon shall be exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under state, municipal or local authority" (p. 116). It was nevertheless held that the bonds were subject to a New York inheritance tax, which was a tax on the privilege of acquiring property by inheritance. To the same effect is *Orr* v. *Gilman,* 183 U. S. 278. Similarly, in *Murdock* v. *Ward,* 178 U. S. 139, Federal bonds were held to be subject to Federal inheritance tax, not-

withstanding a provision in the statute stating that the bonds should be exempt from all taxation. See also *Sherman* v. *United States,* 178 U. S. 150.

In *Igleheart* v. *Commissioner;* 77 F. (2d) 704 (C. C. A. 5th), the court held that Federal Farm Loan bonds might be included in the decedent's gross estate under Section 302 (a) of the Revenue Act of 1926, notwithstanding the fact that the statute provided that the bonds should be exempt from Federal, state, municipal, and local taxation. The court there said (p. 712):

> The estate tax is not a tax on property. It is an excise on the privilege of transmitting property of a decedent upon his death; the amount of the tax being measured by the value of the property transmitted. *Chase National Bank* v. *United States,* 278 U. S. 327, 49 S. Ct. 126, 73 L. Ed. 405, 63 A. L. R. 388; *New York Trust Co.* v. *Eisner,* 256 U. S. 345, 41 S. Ct. 506, 65 L. Ed. 963, 16 A. L. R. 660; *Knowlton* v. *Moore,* 178 U. S. 41, 20 S. Ct. 747, 44 L. Ed. 969. The provision exempting from taxation Federal Farm Loan bonds and the income therefrom is not violated by measuring the estate tax by the value, at the time of the decedent's death, of all of his property, including such bonds, as the United States may tax the transmission of property upon the death of its former owner, regardless of the character of that property. *Plummer* v. *Coler,* 178 U. S. 115, 20 S. Ct. 829, 44 L. Ed. 998; *Murdock* v.

Ward, 178 U. S. 139, 20 S. Ct. 775, 44 L. Ed. 1009; *Greiner* v. *Lewellyn,* 258 U. S. 384, 387, 42 S. Ct. 324, 66 L. Ed. 676.

Upon a like principle it has been held that Liberty Bonds may be included in the measure of the Federal gift tax, which is a tax on transfers and not on property (*Bromley* v. *McCaughn,* 280 U. S. 124), even though the statute exempted the bonds from all taxes except estate and inheritance taxes. *Hamersley* v. *United States,* 16 F. Supp. 768 (C. Cls.), certiorari denied, 300 U. S. 659; *Phipps* v. *Commissioner,* 91 F. (2d) 627 (C. C. A. 10th), certiorari denied, 302 U. S. 742. Income taxes may be imposed on the profit from the sale of such bonds (*Central Hanover Bank & Trust Co.* v. *United States,* 14 F. Supp. 541 (C. Cls.)), and upon salary or dividends paid in such bonds (*Hitner* v. *Lederer,* 14 F. (2d) 991, 55 F. (2d) 343 (E. D. Pa.), affirmed, 63 F. (2d) 877 (C. C. A. 3d); *James* v. *Commissioner,* 13 B. T. A. 764, affirmed on other issues, 49 F. (2d) 707 (C. C. A. 2d)).

Similarly, where constitutional immunity of the obligations or property of a State or the Federal Government from taxation by the other government has been urged in opposition to death duties, this Court has held that the tax was not objectionable, because it was a tax not on those obligations or on that property but on the transfer. *Greiner* v. *Lewellyn, supra; Plummer* v. *Coler, supra; Snyder* v. *Bettman,* 190 U. S. 249; *United States*

v. *Perkins*, 163 U. S. 625. See also *Willcuts* v. *Bunn*, 282 U. S. 216.

Furthermore, the proceeds of War Risk Insurance were exempted "from taxation" (Sec. 3 of the Act of August 12, 1935) or "from all taxation" (Sec. 22 of the World War Veterans' Act, 1924) only in general terms even after similar general language in prior Federal statutes, exempting United States bonds from all Federal and State taxes, had been construed by this Court not to prohibit Federal and State inheritance taxes measured in part by the exempt bonds. *Plummer* v. *Coler*, 178 U. S. 115; *Murdock* v. *Ward*, 178 U. S. 139. The settled rule of construction applies that in "adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment." *Hecht* v. *Malley*, 265 U. S. 144, 153; *Latimer* v. *United States*, 223 U. S. 501, 504; *Sessions* v. *Romadka*, 145 U. S. 29, 42.

3. The petitioner relies upon certain decisions of State courts holding that the proceeds of War Risk Insurance policies are not subject to State inheritance or succession taxes. We submit that those cases are distinguishable, both because the statutes there involved contained no express provision requiring the proceeds of any insurance policies payable to specific beneficiaries to be included in the measure of the tax and because the concept of a

transfer implicit in the laws of those States differed from that developed under the Federal estate tax law.

An examination of the decisions in question shows that the State courts approached the problem of determining whether the proceeds of War Risk Insurance policies could be included in the measure of the State inheritance or succession taxes by seeking to determine whether or not the proceeds passed under the State laws of descent and distribution. Apparently the tax officials did not argue that even though the proceeds did not pass under such laws, there was nevertheless a transfer within the meaning of the State inheritance tax laws, and, as is hereinafter pointed out, the provisions of their taxing statutes precluded such an argument. Most of the cases involved a situation where the designated beneficiary had predeceased the veteran, and under the applicable Federal law the proceeds became payable to the estate, to be distributed under State laws of descent and distribution. It was argued that in view of the latter provision the proceeds passed under State laws and not under the contract, and hence that they were subject to the tax. But the courts rejected that argument, holding that the Federal statute providing that the proceeds should be so distributed was merely a part of the contract and that the insurance passed under the contract. *Tax Comm.* v. *Rife,* 119 Ohio St. 83; *Watkins* v. *Hall,* 107 W. Va. 202; *In re Estate of Harris,* 179 Minn. 450; *Wanzel's Estate,* 295 Pa.

419; *In re Cross' Estate,* 152 Wash. 459. It should be noted that the courts there construed the Federal statute as meaning that upon the death of the designated beneficiary the proceeds passed to the estate to be distributed to the permitted class of beneficiaries who were entitled to take the decedent's personal property. Cf. *Singleton* v. *Cheek,* 284 U. S. 493. *Succession of Geier,* 155 La. 167, was similar, except that the Federal statute applicable to the insurance there involved specifically provided that where the designated beneficiary died the insurance should be paid directly to those of the permitted class of beneficiaries who would take the decedent's personal property under the State law. See 55 A. L. R. (Ann.) 613; 63 A. L. R. (Ann.) 394.

It is true that in some of those cases the courts have held that it was the intention of Congress to exempt the insurance payments from inheritance taxes as well as property taxes, but they have not reached that conclusion by an independent examination of the exemption provision of the Federal statute. In each instance the court has stressed the fact that the proceeds were paid under contract to the beneficiary and did not pass by will or under the intestacy laws. Most of the decisions have distinguished *Plummer* v. *Coler, supra,* and *Murdock* v. *Ward, supra,* on the ground that in those cases the bonds became a part of the succession. *In re Estate of Harris, supra; Tax Comm. v. Rife, supra;*

Wanzel's Estate, supra. For instance, in *Succession of Geier, supra;* the court said (pp. 169–170):

> The terms of the act are clear and unambiguous. Summarizing its provisions, there is a positive prohibition against all taxation on money paid out by the federal government under section 28, arts. 2, 3, and 4; and the insurance provision thereof is a contract between the United States, its agents, and the persons designated in the act as the beneficiaries of deceased service men. It is a bar to all state legislation which is in conflict with it.
>
> Our attention has been called to the cases which hold that a state may impose an inheritance tax on the obligations and securities of the United States which form part of a succession. In those cases the property fell into the succession, no question of the violation of a contract was raised, and the decisions were based upon the finding that the tax was a tax upon the right to inherit and not a tax upon the property. In this case a contract is involved, and the tax sought to be enforced is a tax upon money paid out by the government under the provisions of the War Risk Insurance Act to the beneficiaries of a deceased service man. It may therefore be said that the jurisprudence established by the cases referred to can have no application to this case.
>
> For these reasons we are of the opinion that the beneficiaries of deceased service men, who receive insurance money under the

provisions of the War Risk Insurance Act, do not take as heirs. They come within the permitted class of beneficiaries, because they are the heirs at law or next of kin of the deceased service man, but they are designated in the act as beneficiaries, and they take as such under the contract of insurance to the same extent and in the same manner as the beneficiary named in the policy of insurance would take in the event such beneficiary survived the insured.

In *Tax Comm.* v. *Rife, supra,* the court said (pp. 91–92):

Much stress is placed by counsel for plaintiff in error upon the cases of *Plummer, Exr.,* v. *Coler, Compt.,* 178 U. S. 115, 20 S. Ct. 829, 44 L. Ed. 998, and *Murdock, Exr.,* v. *Ward,* 178 U. S. 139, 20 S. Ct. 775, 44 L. Ed. 1009, in which it is held that bonds of the United States, the property of a decedent, are subject to the state inheritance tax. Of course, such obligations reciting the ordinary relation of debtor and creditor between the government and the holder thereof are like any other property of a decedent, and pass as any other assets of his estate, and are therefore rightly subject to state inheritance tax. However, the proceeds of war risk insurance are a definite kind of property, differing from the ordinary property of a soldier's estate, and are in the nature of a beneficence or gratuity, bounty or pension, affecting the rights of the soldier and his dependents, upon one side, and the government

> of the United States, as a part of its war policy, upon the other side. This distinct class of property by federal enactment is not subject to the claims of creditors, or taxation, and is solely for the benefit of the soldier and his dependents and next of kin. Such assets pass under and by virtue of the federal act, and the decisions in the cases of *Plummer, Exr.*, v. *Coler, Compt., supra,* and *Murdock, Exr.*, v. *Ward, supra,* do not relate to property of that character.

To the same effect is *In re Estate of Harris, supra.*

We submit that these decisions stand for the principle that since the proceeds of War Risk Insurance policies did not pass to the beneficiaries by will or by intestacy, but passed under the contract and the Federal statutes, there was no transfer within the provisions of the inheritance or succession tax statutes there involved; and hence the taxes imposed violated the exemption provisions of the Federal statutes. In other words, there was not a transfer within the meaning of the State laws. It seems clear that the proceeds of ordinary commercial insurance policies payable to specific beneficiaries would also have been excluded from the measure of the transfer taxes imposed by those States, upon the ground that the proceeds did not pass under State laws of descent and distribution.

The tax laws of Ohio, West Virginia, Minnesota, Pennsylvania, Louisiana, and Washington then in

effect did not provide that the proceeds of insurance policies payable to specific beneficiaries should be included in the gross estate. The Washington statute imposed a tax on property passing by will or by the statutes of inheritance, and on certain other transfers that are not material here. Session Laws of Washington, 1917, c. 146, Sec. 1, p. 593. The statutes of the other States were substantially similar. See West Virginia Acts, 1909, c. 63, Sec. 1, p. 511; General Laws of Minnesota, 1905, c. 288, Sec. 1, p. 427, as amended by General Laws of Minnesota, 1911, c. 372, Sec. 1, p. 516; Pennsylvania Laws, 1917, Act No. 318, Sec. 1, p. 832; Ohio General Code, 1910, Vol. 2, Part II, Sec. 5331, as amended by the Act of May 8, 1913, Laws of Ohio, 1913, Vol. 103, Sec. 1, p. 463. The Louisiana statute imposed a tax on all legacies, inheritances, and gifts, *mortis causa*. Acts of Louisiana, 1906, No. 109, p. 173; Acts of Louisiana, 1918, No. 51, p. 75. And the courts of most States have held, in the absence of a specific provision, that the proceeds of policies payable to specific beneficiaries are not subject to the State inheritance taxes. *Vogel's Estate*, 1 Pa. C. C. R. 352; *In re Killien's Estate*, 178 Wash. 335; 32 A. L. R. 353; 47 A. L. R. 522.

It was owing to the fact that the provisions of the Federal statutes relating to War Risk Insurance made the distribution of proceeds after the death of the named beneficiary depend upon local law that the question of the inclusion of the proceeds of such insurance policies in the measure of

the tax arose in the cases cited by petitioner. Hence we submit that the State court decisions upon which it relies are in no way controlling here. It is significant that the New York death transfer tax which is closely analogous to the Federal estate tax has been held applicable to the proceeds of War Risk Insurance policies. *Estate of Gerald Sabin,* 224 App. Div. (N. Y.) 702 reversing 131 Misc. (N. Y.) 451; *Matter of Schaeffer,* 130 Misc. (N. Y.) 436; *Matter of Dean,* 131 Misc. (N. Y.) 125.

4. The petitioner also argues that Congress did not intend that the proceeds of War Risk Insurance policies should be included in the gross estate, since such inclusion must result in the diminution of the proceeds in the hands of the beneficiary. It refers to Sections 314 (b) and 315 (a) and (b) of the Revenue Act of 1926, as amended (Appendix *infra,* pp. 32–33).

Section 315 (a) makes the estate tax a lien for ten years upon the gross estate of the decedent. Section 315 (b) provides that if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if the tax in respect thereto is not paid when due, then the beneficiary shall be personally liable for such tax, and, to the extent of the beneficiary's interest under such contract of insurance, the proceeds shall be subject to a lien equal to the amount of such tax. Section 314 (b) enables executors, after payment of estate

taxes, to secure reimbursement from the beneficiary of an insurance policy of such portion of the total tax paid as the proceeds in excess of $40,000 of such policies bear to the net estate. It provides further that where there are a number of beneficiaries the tax shall be collected from them in the same ratio.

It is clear that the statutes in question do not provide that any part of the estate tax is to be paid in the first instance by the beneficiaries of insurance policies. The statute contemplates that the estate tax shall be paid by the executor before the estate is distributed (Sec. 314 (b)), and he may pay it out of any assets in his hands, regardless of the nature of the property included in the gross estate. The estate tax is not an aggregation of separate taxes but a single tax based upon percentages of the net taxable value of the whole estate. *Guettel* v. *United States*, 95 F. (2d) 229, 230 (C. C. A. 8th), certiorari denied October 10, 1938, No. 47, present Term. It is only in the event that the executor does not pay, or the tax is not otherwise paid, that a lien would be enforced against the proceeds of insurance policies. If the executor does pay, he merely has a right to reimbursement against the beneficiaries which he may or may not enforce. The Commissioner is not required to apportion the tax or to enforce any right to reimbursement or contribution. Article 87 of Regulations 80 (1934 Ed.). And it cannot be assumed in this case that

the beneficiary will be required to pay part of the tax.

But in any event the provision for reimbursement does not alter the character of the tax. The tax is imposed on the transfer and not on the proceeds, whether or not the executor is reimbursed. Even if part of the tax should actually be paid out of the proceeds of the War Risk Insurance, this fact would not serve to show that the tax was imposed upon the proceeds rather than upon the transfer. See *Plummer* v. *Coler, supra*, p. 138; *United States* v. *Perkins*, 163 U. S. 625, 629–630; *Scholey* v. *Rew*, 23 Wall. 331.

There is no basis for the assumption that Congress did not intend that the proceeds of War Risk Insurance policies should be included in the gross estate because of those provisions for reimbursement. It merely expressed its purpose to exempt the proceeds from a direct tax. In so far as other taxes were concerned, particularly the estate tax, it may well have felt that any burden that chanced to fall upon the beneficiary was too negligible to consider, in view of the exemptions granted in the estate tax law itself. Nor do we think that the situation is altered by the fact that Section 22 of of the World War Veterans Act, *infra*, and Section 3 of the Act of August 12, 1935, *infra*, exempt the insurance from the claims of creditors. But even if it should be held otherwise, and if the reimbursement and lien provisions of Sections 314 and 315 should be held inapplicable to War Risk Insur-

ance in view of the statutes dealing with War Risk Insurance, that would not affect the validity of Section 302 (g) or prevent the collection of the tax from the estate. The Revenue Act contains the usual separability provision. See Section 1213, Revenue Act of 1926 (U. S. C., Title 26, Sec. 1699).

The petitioner refers to the fact that hearings on the Bill which subsequently became the Revenue Act of 1918 had begun when the War Risk Insurance Amendments Act of June 25, 1918 (Appendix, *infra*, p. 34), was passed and that the Revenue Act of 1918 was the first statute to contain a provision for taxing insurance payable to specific beneficiaries. Section 402 (f). But the Revenue Act of 1918 exempted insurance not in excess of $40,000 and taxed only estates in excess of $50,000, so that there was no possibility that a veteran dying possessed of only a moderate estate would be liable for any estate tax. If we are to speculate as to what Congress intended by considering that Section 402 (f) was before it at the time that the War Risk Insurance Act was first amended by the Act of June 25, 1918, to include a tax exemption provision, we may well assume that Congress thought that the exemption provisions of the Revenue Act itself afforded sufficient protection to the veteran from the estate tax.

5. The petitioner also argues that in providing that insurance should be exempt from taxation Congress must have had in mind estate taxes

because no other taxes would apply to insurance. We submit that Congress may have had in mind the imposition of property taxes on the insurance. In that connection attention is called to the fact that Section 402 of the War Risk Insurance Act provided insurance against total permanent disability, as well as against death, and that, in the event of the insured's becoming totally and permanently disabled, he himself would receive the insurance.

The legislative history itself throws little light on the intention of Congress. As previously pointed out, the exemption provision first appeared in Section 2 of the Act of June 25, 1918 (Appendix, *infra*, p. 34). The House Report does not discuss this feature of that Act. The Report of the Senate Committee on Finance (S. Rep. No. 428, 65th Cong., 2d Sess.) appends the testimony of Assistant Secretary of the Treasury Love before the Committee, who explained that provision as follows (p. 22):

> Another provision makes a uniform rule applicable to the whole act providing that allotments and allowances, compensation and insurance are not assignable, not subject to claims of creditors, and that they are exempt from taxation. A similar provision is found in section 311 relating to compensation, and in section 301 relating to insurance. By an apparent oversight, however, it was not included in article 2, relating to allotments and family allowances. With a

general provision here inserted, section 311 is repealed as well; also the Senate's in 402, along same line.

We think it plain, therefore, that neither the World War Veterans' Act, 1924, *infra*, nor the Act of August 12, 1935, *infra*, if that statute is applicable, prohibits the imposition of the estate tax here involved. Exemptions from taxation are strictly construed. *Hale* v. *State Board*, 302 U. S. 95; *Pacific Co.* v. *Johnson*, 285 U. S. 480; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134; *Millsaps College* v. *Jackson*, 275 U. S. 129; *Phipps* v. *Commissioner*, *supra*. An asserted exemption will be denied unless it is granted by the statute in plain terms. *United States Trust Co. of New York* v. *Anderson*, 65 F. (2d) 575 (C. C. A. 2d), certiorari denied, 290 U. S. 683; *Phipps* v. *Commissioner*, *supra*.

In *Trotter* v. *Tennessee*, 290 U. S. 354, this Court had under consideration the question whether the exemption from taxation provided by Section 22 of the World War Veterans' Act, 1924, *infra*, extended to lands purchased by the guardian of veterans with money received from the United States as compensation and disability benefits under Titles II and III of that Act. The Court held that the land was not exempt from State and county taxes, and in that connection said (pp. 356–357):

> *Exemptions from taxation are not to be enlarged by implication if doubts are nicely balanced. Chicago Theological Seminary*

v. *Illinois*, 188 U. S. 662, 674. On the other hand, they are not to be read so grudgingly as to thwart the purpose of the lawmakers. The moneys payable to this soldier were unquestionably exempt till they came into his hands or the hands of his guardian. *McIntosh* v. *Aubrey*, 185 U. S. 122. We leave the question open whether the exemption remained in force while they continued in those hands or on deposit in a bank. Cf. *McIntosh* v. *Aubrey, supra; State* v. *Shawnee County Comm'rs*, 132 Kan. 233; 294 Pac. 915; *Wilson* v. *Sawyer*, 177 Ark. 492; 6 S. W. (2d) 825; and *Surace* v. *Danna*, 248 N. Y. 18, 24, 25; 161 N. E. 315. Be that as it may, we think it very clear that there was an end to the exemption when they lost the quality of moneys and were converted into land and buildings. The statute speaks of "compensation, insurance, and maintenance and support allowance payable" to the veteran, and declares that these shall be exempt. We see no token of a purpose to extend a like immunity to permanent investments or the fruits of business enterprises. Veterans who choose to trade in land or in merchandise, in bonds or in shares of stock, must pay their tribute to the state. *If immunity is to be theirs, the statute conceding it must speak in clearer terms than the one before us here.* [Italics supplied.]

6. Finally, this case does not present any constitutional question. The question is what taxes did the contract prohibit, and not whether the

United States may repudiate any obligation under the contract.

The United States does not wish to repudiate its contract with the insured and no such question is presented. We do not contend that the Revenue Act defeats an exemption given to veterans. The question is whether the statute, which forms a part of the contract (*White* v. *United States*, 270 U. S. 175), should be construed as prohibiting the imposition of a Federal estate tax on the transfer of the net estate of a decedent which consists in part of the proceeds of a War Risk Insurance policy. If the statute does not prohibit the tax, there is no violation of any contract and no constitutional reason why the tax may not be imposed. See *Murdock* v. *Ward*, 178 U. S. 139, 148.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted.

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APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [As amended by Sec. 404 of the Revenue Act of 1934].[1] The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States.

* * * * *

(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

* * * * *

[U. S. C., Title 26, Sec. 411.]

SEC. 314. (b) If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the

[1] The amendment changed only the portion of Section 302 preceding the subdivisions and related to the exclusion of real property situated outside the United States.

distribution of the estate or those interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution. If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio [U. S. C., Title 26, Sec. 426].

SEC. 315 (a) [As amended by Section 613 (b) of the Revenue Act of 1928 and by Section 809 of the Revenue Act of 1932]. Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate releasing any or all property of such estate from the lien herein imposed.

(b) [As amended by Section 803 (c) of the Revenue Act of 1932]. If (1) except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the decedent makes a transfer, by trust

or otherwise, of any property in contemplation of or intended to take effect in possession or enjoyment at or after his death, or makes a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the possession or enjoyment of, or the right to the income from, the property, or (B) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom, or (2) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth [U. S. C., Title 26, Sec. 427].

Act of June 25, 1918, c. 104, 40 Stat. 609:

SEC. 2. That four new sections are hereby added to Article I of said Act,[2] to be known

[2] Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department, approved September 2, 1914, as amended.

as sections twenty-seven, twenty-eight, twenty-nine, and thirty, respectively, and to read as follows:

* * * * *

SEC. 28. That the allotments and family allowances, compensation, and insurance payable under Articles II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Articles II, III, or IV; and shall be exempt from all taxation: *Provided,* That such allotments and family allowances, compensation, and insurance shall be subject to any claims which the United States may have, under Articles II, III, and IV, against the person on whose account the allotments and family allowances, compensation, or insurance is payable.

* * * * *

World War Veterans' Act of June 7, 1924, c. 320, 43 Stat. 607, 613:

SEC. 22. That the compensation, insurance, and maintenance and support allowance payable under Titles II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Titles II, III, or IV; and shall be exempt from all taxation: *Provided,* That such compensation, insurance, and maintenance and support allowance shall be subject to any claims which the United States may have, under Titles II, III, IV, and V, against the person on whose account the compensation, insurance, or maintenance and support allowance is payable.

That the provisions of this section shall not be construed to prohibit the assignment

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by any person to whom converted insurance shall be payable under Title III of such Act of his interest in such insurance to any other member of the permitted class of beneficiaries [U. S. C., Title 38, Sec. 454].

Act of August 12, 1935, c. 510, 49 Stat. 607, 609, amending World War Veterans' Act of June 7, 1924:

SEC. 3. Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. Such provisions shall not attach to claims of the United States arising under such laws nor shall the exemption herein contained as to taxation extend to any property purchased in part or wholly out of such payments. Section 4747 of the Revised Statutes and Section 22 of the World War Veterans' Act, 1924, are hereby repealed, and all other Acts inconsistent herewith are hereby modified accordingly. The provisions of this section shall not be construed to prohibit the assignment by any person, to whom converted insurance shall be payable under title III of the World War Veterans' Act, 1924, of his interest in such insurance to any other member of the permitted class of beneficiaries [U. S. C., Supp. III, Title 38, Sec. 454].

SEC. 5. That this Act shall take effect and be in force from and after its passage, but the provisions hereof shall apply to payments made heretofore under any of the

Acts mentioned herein [U. S. C., Supp. III, Title 38, Sec. 454].

Treasury Regulations 70 (1926 Ed.), promulgated under the Revenue Act of 1926:

ART. 25. *Taxable insurance.*—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (*a*) All insurance receivable by, or for the benefit of, the estate; (*b*) all other insurance to the extent that it exceeds in the aggregate $40,000.

The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is deemed to be taken out by the decedent in all cases where he pays all the premiums, either directly or indirectly, whether or not he makes the application. On the other hand, the insurance is not deemed to be taken out by the decedent, even though the application is made by him where all the premiums are actually paid by the beneficiary. Where a portion of the premiums were paid by the beneficiary and the remaining portion by the decedent the insurance will be deemed to have been taken out by the latter in the proportion that the premiums paid by him bear to the total of premiums paid.

* * * * *

ART. 27. *Insurance receivable by other beneficiaries.*—All insurance in excess of $40,000 receivable by beneficiaries other than the estate must be included in the gross estate of any decedent dying after the effective date of the Revenue Act of 1918, except that where the decedent died subsequent to the effective date of the Revenue

Act of 1918, but prior to the effective date of the Revenue Act of 1924, the proceeds of insurance policies taken out by him upon his own life payable to beneficiaries other than to or for the benefit of the decedent's estate, are not includable in the gross estate if the beneficiary receiving the proceeds became such prior to the effective date of the Revenue Act of 1918 and thereby acquired, prior to the effective date of the Revenue Act of 1918, a vested interest in the proceeds of the policy under the State law governing the rights or interest of the beneficiary.

Insurance payable to beneficiaries other than the estate, or for the benefit of the estate, need not be included in the gross estate of a decedent who died before the effective date of Title IV of the Revenue Act of 1918, but where, subsequent to September 8, 1916, such a decedent assigned a policy of insurance payable to or for the benefit of his estate, or caused it to be made payable to a specific beneficiary in contemplation of or intended to take effect in possession or enjoyment at or after his death, the entire proceeds should be included if such assignment or change in beneficiary did not amount to a bona fide sale for a fair consideration in money or money's worth. (See Articles 15 to 21, inclusive.)

The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total, $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in Schedule C of Form 706. The word "beneficiaries," as used in reference to the

$40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

Treasury Regulations 80 (1934 Ed.), promulgated under the Revenue Act of 1926, as amended by the Revenue Acts of 1928, 1932, and 1934:[3]

ART. 25. *Taxable insurance.*—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (*a*) All insurance receivable by, or for the benefit of, the estate; (*b*) all other insurance to the extent that it exceeds in the aggregate $40,000.

The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies operating under the lodge system. Insurance is considered to be taken out by the decedent in all cases, whether or not he makes the application, if he pays the premiums either directly or indirectly, or they are paid by a person other than the beneficiary, or decedent possesses any of the legal incidents of ownership in the policy. Legal incidents of ownership in the policy include, for example: The right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc. The decedent possesses a legal incident of ownership if the rights of the beneficiaries to receive the pro-

[3] This article was amended by T. D. 4729, 1937–1 Cumulative Bulletin 284, 288, but not in any way that is material here.

ceeds are conditioned upon the beneficiaries surviving the decedent.

* * * * *

ART. 27. *Insurance receivable by other beneficiaries.*—The statute requires the inclusion in the gross estate of the decedent of the proceeds of any policy, or the aggregate proceeds of all policies, not receivable by or for the benefit of decedent's estate, to the extent that such proceeds exceed $40,000, regardless of when the policy was or the policies were issued, if the decedent possessed at the time of his death any of the legal incidents of ownership.

The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total, $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in Schedule C of Form 706. The word "beneficiaries," as used in reference to the $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

U. S. GOVERNMENT PRINTING OFFICE: 1936

FILE COPY

IN THE

Supreme Court of the United States

November Term, 1938.

No. 453

UNITED STATES TRUST COMPANY OF NEW YORK,
as Executor u/w of GEORGE H. BUNKER, deceased,
Petitioner and Appellant below,

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee below.

BRIEF FOR THE AMERICAN LEGION, *AMICUS CURIAE*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

ABRAHAM J. ROSENBLUM,
Attorney for The American Legion, *Amicus Curiae*.

Law Brief Press—New York City

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BRIEF FOR THE AMERICAN LEGION, *AMICUS CURIAE.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The question presented in this case is of importance to all veterans of the World War who are still carrying their war risk insurance policies as term insurance or who have converted those policies to some form of ordinary life policy in accordance with the provisions of Section 310 of the World War Veterans Act of 1924, as amended May 29th, 1928 (38 U. S. C. A. 512).

According to the annual report of the Administrator of Veterans Affairs for the fiscal year ended June 30th, 1937, there were in effect at the end of that year 150 policies of yearly renewal term insurance, totalling $356,519 and 596,832 United States Government life (converted) insurance policies, totalling $2,577,982,119.

The report contained this statement (p. 22):

> "Policies in force. * * * During this fiscal year 1,153 policies amounting to $5,192,662 insurance were reinstated."

There is, of course, no way of estimating the number of veterans who may avail themselves of the privilege of applying for United States Government life insurance policies under the provisions of Section 310 of the World War Act of 1924, as amended, *supra*.

Despite the decision of the Board of Tax Appeals in *Bankers Trust Company* v. *Commissioner*, 33 B. T. A. 746, upon which the Board of Tax Appeals relied as authority for its decision in the instant case, the government has continued to make the representation to veterans who have not reinstated and converted their war risk insurance policies that the policies are exempt from all taxation. In a pamphlet designated as "Insurance form 752," entitled "Information and Premium Rates—United States Government Life Insurance," issued by the Veterans' Administration, revised February 1936, the Veterans' Administration makes this unequivocal statement:

> "A Government life insurance policy shall not be assignable, *and the proceeds of a policy are exempt from all taxation*, and shall not be subject to the claims of creditors of the insured or creditors of the beneficiary to whom they may be awarded, except claims of the United States arising under any of the laws relating to veterans." (Italics ours.)

Even more interesting is the fact that "Insurance form #724" issued by the Veterans' Administration, revised April 1937, which is called "Change of Beneficiary—United States Government Life Insurance," contains the following statement:

> "The insurance shall be exempt from all taxation and from the claims of creditors of the insured or the beneficiary, except any claims of the United States arising under any of the laws relating to veterans."

The language of the Act originally authorizing the issuance of the policies during the war specifically stated (Section 28, War Risk Insurance Act [June 25, 1918], amending Section 402, Act of October 6, 1917):

> "That the allotments and family allowances, compensation, and insurance payable under articles II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under articles II, III, and IV; and shall be exempt from all taxation: * * *."

Section 22 of the World War Veterans Act (June 7, 1934) contained identical language (38 U. S. C. A. 454).

The present act (Act of August 12, 1935, 49 Stat. 607) provides that "payments made to * * * a beneficiary under any of the laws relating to veterans shall be exempt from taxation."

In recent cases decided by this Court involving veterans and veterans' statutes, there has been evident an intention to protect and to prevent any diminution of the rights accorded to veterans by the legislation enacted during the World War and since that time.

> *Lynch* v. *United States*, 292 U. S. 571;
> *United States* v. *Jackson*, 302 U. S. 628.

Contrasted with the opinion of the Board of Tax Appeals and of the court below, are the cases in the state courts which have upheld the claim for exemption from inheritance taxation in identical situations under these statutes. Most of these are cited at page 7 of the petitioner's brief. An

additional case is that of *In re Fisher's Estate*, 302 Pa. 516; 153 Atl. 736.

In sustaining the exemption of adjusted service certificates (38 U. S. C. A. 618) state courts have construed the language strictly for the benefit of veterans' estates.

> *In re Murray's Estate*, 159 Misc. 865; 289 N. Y. S. 81;
> *Jones* v. *Price*, 107 W. Va. 55; 146 S. E. 890;
> *De Baum* v. *Hulett Undertaking Co.*, 169 Miss. 488, 494; 153 So. 513, 514.

The rule which should be applied to cases of this type is set forth in *In re Murray's Estate*, *supra*, at page 866:

> "It is a familiar fact that veteran exemption acts in general have usually been accorded a liberal construction in favor of the person sought to be benefited. Yates County National Bank v. Carpenter, 119 N. Y. 550, 554, 23 N. E. 1108, 7 L. R. A. 557, 16 Am. St. Rep. 855; Surace v. Danna, 248 N. Y. 18, 24, 161 N. E. 315; Stockwell v. National Bank of Malone, 36 Hun 583, 585; Burgett v. Fancher, 35 Hun 647, 649; Lind v. Miller, 145 Misc. 477, 478, 260 N. Y. S. 343; Benedict v. Higgins, 165 App. Div. 611, 614, 151 N. Y. S. 42, 44. As was said in the last cited case: 'The broad spirit of gratitude which prompted the enactment of this law should control the courts in enforcing it.'"

CONCLUSION.

It is respectfully submitted that the Writ of Certiorari should issue as prayed for.

Respectfully submitted,

ABRAHAM J. ROSENBLUM,
Attorney for The American Legion, *Amicus Curiae*.

SUPREME COURT OF THE UNITED STATES.

No. 453.—October Term, 1938.

United States Trust Company of New York, as Executor u/w of George H. Bunker, Deceased, Petitioner, vs. Guy T. Helvering, Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 17, 1939.]

Mr. Justice Black delivered the opinion of the Court.

The sole question is whether proceeds of a War Risk Insurance policy payable to a deceased veteran's widow were properly included in his gross estate under a Federal estate tax.

The Federal estate tax in question[1] included in a decedent's gross estate the amount in excess of forty thousand dollars received by "beneficiaries [other than his estate] as insurance under policies taken out by the decedent upon his own life." This veteran's total life insurance for beneficiaries other than his estate exceeded at death the statutory exemption of forty thousand dollars, if his War Risk Insurance policy payable to his widow in the sum of ten thousand dollars is included. The Commissioner assessed an estate tax measured by this excess. As decedent's executor, petitioner claimed that proceeds of the War Risk Insurance policy could not be included in the estate because of Section 22 of the World War Veterans' Act, 1924, providing that such "insurance . . . shall be exempt from all taxation."[2] The Board of Tax Appeals upheld the determination of the Commissioner, and the Circuit Court of Appeals affirmed.[3]

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[1] Section 302(g) Revenue Act of 1926, as amended.

[2] 43 Stat. 607, 613.

[3] 98 Fed. (2d) 734. State courts have differed as to whether proceeds of War Risk Insurance are subject to death duties imposed by the States. See, for example, In re Estate of Harris, 179 Minn. 450, Tax Commission v. Rife, 119 Oh. St. 83, Wanzell's Estate, 295 Pa. 419, Watkins v. Hall, 107 W. Va. 202, (holding these proceeds not subject to such excises); and Matter of Sabin, 224 Ap. Div. 702, Matter of Dean, 131 Misc. 125 (contra). In view of this fact and the importance of an authoritative interpretation of the Federal statutes involved, we granted certiorari. — U. S. —.

Congress has manifested a consistent policy in the Revenue Acts from 1918 to 1934, when the veteran died, by impositions of estate taxes upon transfers at death of proceeds of all life insurance (not payable to an insured's estate) in excess of forty thousand dollars. This has been in harmony with a general plan of graduating income and inheritance taxes to accord with the respective sizes of incomes and estates.[4] And the Treasury Regulations have stated that "The statute provides for the inclusion in the gross estate of . . . All insurance [not for the benefit of an estate] . . . to the extent that it exceeds . . . forty thousand dollars . . . . The term 'insurance' refers to life insurance of every description . . . . ."[5]

But petitioner invokes the provision of the World War Veterans' Act, 1924, that insurance thereunder "shall be exempt from all taxation." An amendment to that Act of August 12, 1935[6] provides that "Payments of benefits due or to become due . . . shall be exempt from taxation . . . . ." However, this amendment served only to clarify the original provision for exemption without more.[7] Unless resort is had to enlargement by implication, this exemption means only that the proceeds or benefits of a War Risk policy are exempt from taxation. Exemptions from taxation do not rest upon implication.[8]

An estate tax is not levied upon the property of which an estate is composed. It is an excise imposed upon the transfer of or shifting in relationships to property at death.[9] The tax here is no less an estate tax because the proceeds of the policy were paid by the Government directly to the beneficiary; the taxing power was nevertheless exercised upon "the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another."[10] In an analogous situation, Federal bonds exempt by statute from all taxation have been

[4] See, 44 Stat. 9, 21, 22; 48 Stat. 680, 684, 754.

[5] Treasury Regulation No. 70, (1929 Edition), Articles 25 and 27; Treasury Regulation No. 80, (1934 Edition), Articles 25 and 27.

[6] 49 Stat. 607, 609.

[7] Lawrence v. Shaw, 300 U. S. 245, 249.

[8] Rapid Transit Corp. v. New York, 303 U. S. 573, 592, 593; Trotter v. Tennessee, 290 U. S. 554, 556, 557; J. W. Perry Co. v. Norfolk, 220 U. S. 472, 480; Theological Seminary v. Illinois, 188 U. S. 662, 672.

[9] Reinecke v. Northern Trust Co., 278 U. S. 339, 347; Chase National Bank v. United States, 278 U. S. 327, 334; United States v. Jacobs, — U. S. —, p. —.

[10] Chase National Bank v. United States, *supra*, 337.

held subject to a Federal inheritance tax.[11] And State inheritance taxes can be measured by the value of Federal bonds exempted by statute from State taxation in any form.[12] Similarly, the statutory immunity of War Risk Insurance from taxation does not include an immunity from excises upon the occasion of shifts of economic interests brought about by the death of an insured.

Petitioner makes the further point that the inclusion of proceeds of the War Risk policy for purposes of an estate tax amounts to an impairment of the Government's contract with the insured veteran, a violation of the Fifth Amendment to the Constitution. But neither the Act of 1924, as amended, nor any of the provisions of the War Risk Insurance Act purported to exempt War Risk Insurance from death duties. Therefore, no statutory exemption which could be considered a provision of the insurance contract has been affected by the imposition of the estate tax in this case. The judgment is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[11] Murdock v. Ward, 178 U. S. 139.

[12] Plummer v. Coler, 178 U. S. 115.